(2)

No. 87-1232

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MARY ROSE,

Petitioner,

—against—

THE LONG ISLAND RAILROAD PENSION PLAN, LONG ISLAND RAILROAD PENSION PLAN'S BOARD OF MANAGERS, LONG ISLAND RAILROAD PENSION PLAN'S JOINT BOARD ON PENSION APPLICATIONS, MORGAN GUARANTY TRUST COMPANY OF NEW YORK, as Trustee of the Plan, T. P. MOORE and JOHN DOE, As members of the Plan's Board of Managers, T. M. TARANTO, J. B. HUFF and H. J. LIBERT, As members of the Plan's Board of Managers and the Joint Board on Pension Applications, E. YULE, W. STYZIAK and J. BOVE, As members of the Joint Board on Pension Applications, and THE LONG ISLAND RAILROAD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Counter-Statement of the Question Presented

Whether certiorari should be granted to review the decision of the United States Court of Appeals for the Second Circuit that The Long Island Rail Road Company Pension Plan (the "Plan"), established and maintained by the State-owned and operated The Long Island Rail Road Company (the "LIRR"), is a "governmental plan" within the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* and § 1002(32) ("ERISA") where (1) the LIRR, the Members of which are appointed by the Governor of the State of New York, is wholly owned by, and statutorily has all the governmental privileges, immunities and exemptions of, the Metropolitan Transportation Authority (the "MTA"), a public authority created by the State of New York expressly to acquire the LIRR to perform "essential governmental functions", (2) the concerns that led Congress to exempt governmental pension plans from ERISA, namely (a) that the sudden imposition of a minimum funding requirement could create a considerable, and unreasonable, burden for taxpayers and (b) that funding of public plans was regarded as adequate and secure because of governmental taxing authority, apply squarely to the LIRR because it depends for its existence on regularly mandated and substantial State, federal and local governmental funding, (3) all of the United States expert agencies responsible for interpreting and enforcing ERISA (the Departments of Justice and Labor, the Internal Revenue Service and the Pension Benefit Guaranty Corporation), as well as the State of New York have urged vigorously in *amicus curiae* submissions in this action that the Plan is a "governmental plan" and (4) the Court of Appeals' decision is wholly consistent with ERISA's language and legislative history, Supreme Court precedent, the opinions and rulings of the expert agencies and does not conflict with the decision of any other federal Court of Appeals?

List of Parents, Subsidiaries and Affiliates

The LIRR is, and since 1966 has been, wholly owned by the MTA, a public authority of the State of New York. The MTA also wholly owns other governmental entities, including the Metro-North Commuter Railroad Company, Staten Island Rapid Transit Operating Authority and Metropolitan Suburban Bus Authority, which enjoy the same governmental powers, privileges and immunities as the MTA and the LIRR and which, like the LIRR, are responsible for key commuter transportation facilities in the New York metropolitan area. Members of the MTA's Board are the sole Members of these entities, and also are the sole Members of the New York City Transit Authority and the Triborough Bridge and Tunnel Authority. N.Y. Pub. Auth. Law § 1264 (1).*

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* This brief is submitted on behalf of all respondents except Yule, Styziak and Bove, who are named as representatives of certain unions representing employees of the LIRR and who have taken no position here. Morgan Guaranty Trust Company of New York ("Morgan Guaranty"), a former trustee of the LIRR Plan, is not a real party in interest in this action. In compliance with Supreme Court Rule 28.1, however, the most recent Form 10-K filed with the Securities and Exchange Commission provides that Morgan Guaranty is a wholly owned subsidiary of J.P. Morgan & Co. Incorporated.

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Counter-Statement of the Case

Petitioner alleges that the Plan violated the requirements of section 205 of ERISA, 29 U.S.C. § 1055, because it did not contain the precise automatic annuity benefit provisions man-

dated for ERISA-covered pension plans.[1] The Plan instead required that a Plan participant affirmatively elect survivorship benefits.

The LIRR contends that the Plan is a "governmental plan" under 29 U.S.C. §§ 1003(b) and 1002(32) and as such is not subject to ERISA's survivorship and funding requirements, among many others. As discussed more fully below, the LIRR, which performs an "essential governmental function" (N.Y. Pub. Auth. Law § 1264), is wholly owned by the MTA and enjoys all of the MTA's governmental privileges, powers, immunities and exemptions, including, among others, the power of eminent domain, exemption from taxes and police powers. The LIRR depends for its existence on regular, mandated and substantial State, federal and local funding.

Petitioner is the surviving spouse of Richard Rose, a former LIRR employee who died in 1976. He died prior to retiring, not having filed papers electing survivorship annuity benefits under the Plan for his spouse.

The LIRR established the Plan and The Long Island Rail Road Company Plan for Additional Pensions (collectively "the Plans") in 1971 pursuant to collective bargaining agreements between the LIRR and unions representing LIRR employees. The Plan replaced a fundamentally different plan covering primarily management employees called The Long Island Rail Road Company Plan for Supplemental Pensions. In 1974, the Plan was amended to the form that was in effect at the time of Mr. Rose's death.

Under the Plan, Mr. Rose had the right from August 1975 onward to receive a "service-age pension" payable monthly for his life without survivorship benefits or to elect that a pension be paid after his death to his surviving spouse. Had he made

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1 Rose previously brought an action in New York Supreme Court, Queens County, alleging similar underlying facts and requesting similar relief under state law claims. That action essentially has been dormant since this action was commenced.

such an election, the monthly benefits payable for his life would have been actuarially reduced to reflect the payments due to his surviving joint annuitant. By not electing a survivorship annuity, Mr. Rose's monthly pension benefits would have been higher.

Following Mr. Rose's death, Rose applied for survivorship benefits. Because her husband never elected a survivorship option, her application for survivorship benefits was denied.[2]

Following four years of extensive discovery after a remand from the Court of Appeals,[3] including seven depositions of defendants and non-parties, five sets of interrogatories and five document requests, the LIRR moved for summary judgment on April 11, 1986, contending that the Plan was a governmental plan exempt from the requirements of Title I of ERISA. Rose cross-moved for summary judgment on June 20, 1986. By decision rendered September 26, 1986, the District Court granted defendants' summary judgment motion, denied Rose's cross-motion and dismissed the complaint, holding that the Plan was a "governmental plan" exempt from ERISA's requirements.

On appeal, at the express request of the Second Circuit, the United States Department of Justice, the United States Department of Labor, the Internal Revenue Service and the Pension Benefit Guaranty Corporation, all of the expert agencies charged with enforcing, interpreting and administering ERISA, submitted a brief as *amicus curiae*, in which they vigorously and unequivocally urged that ERISA's statutory language, its legislative history, their own administrative opinions and rulings and judicial precedent from this Court and other courts compel the conclusion that the Plan is a "governmental plan" and, therefore, is exempt from the Title I requirements of ERISA. Indeed, the Government noted that:

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2 Rose concedes that if the Plan is a "governmental plan" within the meaning of ERISA, dismissal of the complaint is required.

3 The full procedural history is set forth in the Second Circuit's decision, *Rose v. The Long Island Railroad Pension Plan*, 828 F.2d 910, 912-13 (2d Cir. 1987).

> "this case does not present a borderline question. The governmental ownership, control, funding and powers, as well as the public purpose, of the LIRR overwhelmingly establish its governmental nature and nexus to the State of New York and the MTA." (Government Br. at 17) (19a)

The State of New York, which earlier had sought to intervene in the action as a defendant, also made an *amicus* submission urging that the Plan is a governmental plan.[4]

By unanimous published decision dated September 3, 1987 (reported at 828 F.2d 910), the Second Circuit affirmed the District Court's decision, holding that the Plan, established and maintained for its employees by the LIRR, at all relevant times was a governmental plan and therefore exempt from Title I of ERISA because the LIRR is an agency or instrumentality of the MTA, which in turn is a political subdivision of the State of New York within the meaning of 29 U.S.C. §§ 1002(32) and 1003(b)(1).

Reasons Why the Petition Should Be Denied

The Second Circuit's decision, based on an undisputed record, conforms fully to and is guided by this Court's holding in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 603-05 (1971), and the leading Second Circuit decisions in *Commissioner v. Shamberg's Estate*, 144 F.2d 998 (2d Cir. 1944), *cert. denied*, 323 U.S. 792 (1945), and *Commissioner v. White's Estate*, 144 F.2d 1019 (2d Cir. 1944), *cert.*

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4 A copy of the *amicus curiae* brief submitted by these expert agencies is annexed as Appendix A (the "Government Br."). A copy of the letter submitted by the State of New York as *amicus curiae* is annexed as Appendix B.

In a March 1, 1977 National Office Technical Advice Memorandum, annexed as Appendix C, the Internal Revenue Service concluded that the LIRR is an agency or instrumentality of the MTA, which is a political subdivision of the State, and that therefore the Plan is a "governmental plan."

denied, 323 U.S. 792 (1945), and all of the relevant rulings and opinions of the expert United States agencies. None of these cases, rulings or opinions is even cited by petitioner. Further, the Second Circuit's decision does not conflict with any decision of any other federal Court of Appeals, another point not disputed by petitioner. Finally, the Second Circuit's decision does not raise an important federal question which must be decided by this Court; it involves the interpretation of a limited definitional provision of ERISA in a limited factual context. As clearly set forth in the Second Circuit's decision and in the Government's brief, ERISA's statutory language and legislative history and all relevant administrative and judicial precedent firmly support the conclusion that the Plan is a governmental plan and therefore is exempt from the Title I requirements of ERISA.

Summary of Argument

The Plan is a "governmental plan" because:

(1) As the Second Circuit held, the LIRR is at least an agency or instrumentality of the MTA, which itself is a political subdivision within the meaning of 29 U.S.C. § 1002(32). Among other things: (a) the LIRR is, and since 1966 has been, a wholly owned subsidiary of the MTA; (b) the LIRR statutorily has all of the extensive governmental privileges, powers, immunities and exemptions of the MTA; (c) when it created the MTA expressly to acquire the LIRR, the New York Legislature declared the LIRR to be an entity of "vital importance" performing an "essential governmental function"; (d) the Members of the governing board of the LIRR, who by law are the same as the Members of the MTA, are appointed by the Governor with the advice and consent of the Senate; (e) the LIRR has the power to make rules superseding local government regulations; (f) the LIRR has its own police force with powers equal to state, county and municipal police; (g) the LIRR has the power of eminent domain, is exempt from local regulations and taxes and has a host of other governmental

powers; and (h) the LIRR depends for its very existence on regularly mandated and substantial State, federal and local funding. No "private" entity has these attributes or this background. Petitioner does not and cannot counter these conclusive and dispositive facts.

(2) Precedent of this Court and of the Second Circuit support a finding (see *infra* at 15-17), and the consistent opinions and rulings of all of the expert United States agencies charged with responsibility for the administration and interpretation of ERISA all have concluded (see *infra* at 13-15), that plans similar to the LIRR's Plan are "governmental plans". Most significantly, the United States Department of Justice, the United States Secretary of Labor, the United States Secretary of the Treasury (and the Internal Revenue Service) and the Pension Benefit Guaranty Corporation expressly have urged in this action that the Plan is a "governmental plan".

(3) The concerns that led Congress to exempt governmental entities' employee benefit plans, are: (a) that the sudden imposition of a minimum funding requirement could create a considerable, and unreasonable, burden on taxpayers and (b) that funding of public plans was generally regarded as adequate and secure because of governmental taxing authority. These Congressional concerns apply squarely to the LIRR because of the LIRR's dependence on regular, substantial and mandated State, federal and local governmental funding it needs to survive.

(4) The financial impact of a decision holding that the Plan is not a "governmental plan" would be devastating to the LIRR, the State of New York and, ultimately, the taxpayers and would have a disastrous impact nationwide on a multitude of plans similar to the LIRR's that also are operating under the well-founded belief that they are "governmental plans". Keeping the taxpayer shielded from that kind of burden is precisely why Congress exempted governmental plans from most of ERISA's requirements.

Argument

I.

THE SECOND CIRCUIT'S DECISION WAS CORRECT AND DOES NOT MERIT PLENARY REVIEW

1. The Second Circuit Correctly Held that a Retirement Plan Is Exempt from Title I of ERISA if It Is Established or Maintained by (1) the Government of a State, (2) a Political Subdivision of a State or (3) an Agency or Instrumentality of Any of the Foregoing

The sole issue before the Second Circuit was whether the Plan qualifies as a "governmental plan" under Title I of ERISA. No new issue is raised here.

The term "governmental plan" is defined in 29 U.S.C. § 1002(32), which provides in pertinent part:

> "The term governmental plan means a plan established or maintained for its employees by the Government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."

Based on the plain statutory language and the legislative history of ERISA, the Second Circuit concluded, in harmony with all relevant prior rulings and determinations as well as the Government Brief, that a pension plan qualifies as a "governmental plan" under ERISA if it is established (1) by the government of a state, (2) by a political subdivision of a state, or (3) by an agency or instrumentality of a state or of a political subdivision of a state. 828 F.2d at 914-15.

Rose argues that the phrase "by the government of any State or political subdivision thereof" in the definition of a "governmental plan" should be interpreted as meaning the government of any state or the *government* of a political subdivision of a state or the agency or subdivision of one of these governments. Cert. Petition at 12-16. There is absolutely no precedent—in

case law, ERISA's legislative history or administrative rulings—for petitioner's hyper-restrictive reading of the statute. The Second Circuit rejected petitioner's interpretation, sensibly concluding that "[i]f, as Rose maintains, Congress enacted the exemption primarily to protect the autonomy of state and local governments, then it would not make sense to extend the exemption to state agencies and instrumentalities—which are not governments—while denying the exemption to public authorities." 828 F.2d at 914. The Government comes to the same conclusion (Government Br. 13-17) (16a-19a).[5]

The Second Circuit also noted that in ERISA § 3031(a), *originally codified at* 29 U.S.C. § 1231(a), Congress directed further study of plans exempt from ERISA, including:

> "retirement plans established and maintained or financed (directly or indirectly by the Government of the United States, by any State (including the District of Columbia) or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."

ERISA § 3031(a), *originally codified* at 29 U.S.C. § 1231(a), *quoted in* 828 F.2d at 915.

As the Second Circuit concludes, ERISA § 3031(a) "clearly encompasses *all* political subdivisions of states, whether or not they are *governments*. The clear language of [ERISA § 3031(a)] thus provides an additional way to interpreting the ambiguous language of 29 U.S.C. § 1002(32)." 828 F.2d at 915 (emphasis in original).

The Second Circuit also analyzed the legislative history of ERISA, noting that the "governmental plan" exemption "is in

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5 Alternatively, and as recognized by the Government, this "*government* of a state" or "*government* of a political subdivision" argument can be avoided altogether because the LIRR is "an agency or instrumentality" of the State itself in addition to being an agency or instrumentality of the MTA (*see* Government Br. at 20) (21a). The Second Circuit did not need to reach this point because it agreed with the LIRR's interpretation of the ERISA governmental plan definition. 828 F.2d at 914-15.

part based on principles of federalism" and that the governmental plan exemption was instituted to avoid interfering with the "literally thousands of public employees retirement systems operated by towns, counties, *authorities* and cities in addition to the state and Federal plans." H.R. Rep. No. 533, 1974 U.S. Code Cong. & Ad. News at 4647 (emphasis added), *quoted in* 828 F.2d at 914. Accordingly, the Second Circuit held that the "governmental plan" exemption applies to agencies or instrumentalities of political subdivisions of states.

2. The LIRR Plan Is Established and Maintained by a Governmental Entity

a. *The Statutory Powers of the LIRR*

The symbiotic relationships between and among New York State, the LIRR and the MTA, which are controlling as to whether the Plan is a "governmental plan", are largely fixed by statute:

1. In 1965, the MTA, then called the Metropolitan Commuter Transportation Authority, was created by the New York State Legislature for the express purpose of acquiring the LIRR and continuing its operations in order to preserve, strengthen and improve commuter services which constitute an "essential public purpose" of "vital importance" to the welfare of the People of New York State. 1965 N.Y. Laws, ch. 324; *see* N.Y. Pub. Auth. Law §§ 1260 *et seq*. The Legislature issued findings and declarations with respect to the acquisition of the LIRR, including the following:

> (a) "Efficient and adequate transportation of commuters within the New York metropolitan area is of vital importance to the commerce, defense and general welfare of the New York metropolitan area, the state, and the nation." 1965 N.Y. Laws ch. 324, § 1 at ¶ 1.
>
> (b) "The continued deterioration of the financial situation and physical condition of the Long Island Rail Road . . . constitutes a serious threat to the economic well-being of the state." *Id.* at ¶ 2.

(c) "The urgent and immediate need for the stabilization, strengthening and improvement of commuter services for the transportation of persons in the metropolitan area can be met by the creation of a public authority to serve as the state's instrument for the carrying out of programs designed to continue and improve commuter services." *Id.* at ¶ 6.

(d) "It is declared to be the policy of the state that the preservation, strengthening and improvement of commuter services is an essential public purpose, and that it is in the public interest for the state and its political subdivisions, in cooperation with other levels of government, to take appropriate measures and assume responsibilities for the preservation of such essential services." *Id.* at ¶ 8.

2. In 1966, the MTA acquired the LIRR, by purchasing all of its stock, with $65 million loaned by the State of New York. No private individual or entity has held any beneficial interest in the LIRR since that time.

3. The loan of $65 million loan was not repaid from operating revenue, but by a 1967 State bond issue, a portion of the proceeds of which was appropriated to the MTA to "repay" the loan. 1967 N.Y. Laws ch. 715, § 1(b), ch. 718.

4. The Legislature declared that the MTA and the LIRR perform an "*essential governmental function*" in carrying out their purpose on behalf of the State of New York. Those purposes are to continue, develop and improve commuter transportation within the Metropolitan Commuter Transportation District. N.Y. Pub. Auth. Law § 1264 (emphasis added).

5. The MTA "may acquire, hold, own, lease, establish, construct, effectuate, operate, maintain, renovate, improve, extend or repair any of its facilities through, and cause any one or more of its powers, duties, functions or activities to be exercised or performed by, one or more [of its] wholly-owned subsidiary corporations. . . . Each subsidiary corporation of the MTA [including the LIRR] and any of its property, func-

tions and activities have all of the privileges, immunities, tax exemptions and other exemptions of the [MTA itself] and of the [MTA's] property, functions and activities." N.Y. Pub. Auth. Law § 1266(5).

6. Since its acquisition by the MTA in 1966, the LIRR has had all the statutory privileges, immunities and exemptions of the MTA, N.Y. Pub. Auth. Law § 1266(5), including the following:

(a) The MTA, the LIRR and their property are exempt from New York State and local taxation. N.Y. Pub. Auth. Law § 1275.

(b) The MTA and the LIRR have the power of eminent domain. N.Y. Pub. Auth. Law § 1267.

(c) The facilities, activities and operations of the MTA and the LIRR are not under the jurisdiction of any municipality or political subdivision, including any county, city, village, or town, school or other district, and are not subject to any local or municipal laws and ordinances that conflict with either the Metropolitan Transportation Authority Act, N.Y. Pub. Auth. Law §§ 1260 *et seq.*, or the rules and regulations of the MTA or the LIRR. N.Y. Pub. Auth. Law § 1266(8).

(d) The MTA and the LIRR have the right to make rules that supersede local regulations, violations of which are punishable by fine or imprisonment. N.Y. Pub. Auth. Law § 1266(4) & (5).

(e) The MTA and the LIRR are immune from town zoning and building regulations with respect to the operation of railroad stations for the "governmental purpose of public transportation." New York State Comptroller Op. 85-14.

(f) The LIRR and the MTA are exempt from the jurisdiction of the New York Public Service Commission (now the Department of Transportation). N.Y. Pub. Auth. Law § 1266(8); *see Long Island Rail Road Co. v.*

Public Service Commission, 30 A.D.2d 409, 292 N.Y.S.2d 167 (2d Dep't 1968), *aff'd mem.*, 23 N.Y.2d 852 (1969).

7. The LIRR has its own police officers, who have powers equal to those of all other state, county and municipal police officers. N.Y. Crim. Proc. Law § 1.20(34)(1).

8. The MTA and the LIRR are governed by Members appointed by the Governor with the advice and consent of the New York Senate. N.Y. Pub. Auth. Law § 1263(1). The Members of the LIRR are by law the same persons who serve as Members of the MTA. N.Y. Pub. Auth. Law § 1266(5).

9. The MTA sets passenger fares for the LIRR, and the MTA must hold a public hearing with respect to changes in these fares. N.Y. Pub. Auth. Law § 1266(3).

10. The MTA and LIRR may conduct investigations and hearings, have access to books and records relating thereto and may apply for court-issued subpoenas in aid of such investigations and hearings. N.Y. Pub. Auth. Law § 1265(12).

11. The MTA and the LIRR may "do all things necessary, convenient or desirable to carry out its purposes and for the exercise of the powers granted in [the Metropolitan Transportation Authority Act, N.Y. Pub. Auth. Law § 1260 *et seq.*]." N.Y. Pub. Auth. Law § 1265(14).

The fact is that "[t]he LIRR is owned and operated for the benefit of the People of the State of New York." (N.Y. Letter at 31a). The State ownership and control, and the statutory sovereign powers, governmental privileges and immunities of the LIRR are beyond dispute.

b. *The LIRR Qualifies as a Governmental Entity under All Applicable Criteria*

Petitioner claims that the Second Circuit "improperly applied . . . criteria applicable to the interpretation of terms of the NLRB and Title VII" and argues that "[t]hirteen years after the enactment of ERISA, neither the U.S. Department of

Labor, nor the P.B.G.C., nor the I.R.S. has issued any regulations clarifying the 'governmental plan' exemption or providing definitions under ERISA of terms like 'political subdivision' and 'agency or instrumentality.' " Cert. Petition at 23. Petitioner fails to mention, however, that the United States agencies have interpreted the governmental plan exemption in numerous ruling and opinions, as well as in their *amicus curiae* brief to the Second Circuit. As the Second Circuit notes, "[t]he Internal Revenue Service, however, has had occasion to define 'agency or instrumentality' under 26 U.S.C. § 414(d). That section was added to the Internal Revenue Code by Title II of ERISA and defines those 'governmental plans' which are exempt from certain qualifications requirements for favorable tax treatment." 828 F.2d at 917 (citations omitted). As the Second Circuit notes, in interpreting the "governmental plan" exemption under Title II of ERISA, "the IRS has consistently relied on *Revenue Ruling* 57-128, 1957-1 C.B. 311, which lists six factors to be considered in determining whether a particular entity is an agency or instrumentality." 828 F.2d at 118. The LIRR satisfies all six of the IRS criteria:

> (1) the LIRR serves an "essential governmental function," see N.Y. Pub. Auth. Law §§ 1264(2), 1266(5);
>
> (2) it performs its function on behalf of the State of New York, *id.*;
>
> (3) it is wholly owned by the MTA, a governmental entity, *id.* § 1266(5);
>
> (4) it is controlled by the same public appointees who are members of the MTA, *id.* §§ 1263(1)(a), 1266(5);
>
> (5) the LIRR performs functions delegated to it by the MTA pursuant to express statutory authority, *id.* § 1266(5); and
>
> (6) the LIRR is heavily dependent on state subsidies to meet its operating expenses.

828 F.2d at 918. The Second Circuit, accordingly, "adopt[ed] the IRS criteria and conclude[d] that the LIRR is an 'agency or

instrumentality' of the MTA under 29 U.S.C. § 1002(32)." 828 F.2d at 918.

As the Second Circuit noted below, the opinions, rulings and regulations of the IRS and other governmental agencies, although not conclusive on this Court, are entitled to "great deference". 828 F.2d at 918; *see Hawkins*, 402 U.S. at 605; *Batterton v. Francis*, 432 U.S. 416, 424-25 (1977). Where Congress has expressly delegated to a federal agency the power to enact regulations to prescribe standards for interpreting statutory terms, the agency (not the courts) is given primary responsibility for interpreting the statutory terms.

The United States Departments of Labor and the Treasury and the IRS, and the PBGC all have authority to issue legislative regulations and rulings under ERISA. These agencies have an expertise in interpreting ERISA that must be given great deference.

Notably, these three expert agencies apply uniform standards in analyzing and ruling on questions arising under the ERISA governmental plan exemption. The Internal Revenue Service concluded in its March 1, 1977 National Office Technical Advice memorandum that the LIRR is an agency or instrumentality of the MTA (35a).[6] And all of the United States expert agencies urge in the Government Brief in this action that the Plan is a "governmental plan". This conclusion is firmly rooted in the United States agencies' rulings and opinions,[7] and should be accorded "great deference".

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6 *See* IRS *Private Letter Ruling* 82-17128 (holding that a retirement plan of the wholly-owned subsidiary of a state transportation authority is a "governmental plan"). Further, as set forth in the Government Brief, "[t]he PBGC considers the LIRR Plan to be a government plan exempt from Title IV coverage and has never collected the premiums mandated by Title IV for private plans from the LIRR." Government Br. at 11 n.8 (14a).

7 *See Revenue Rulings* 57-128, 1957-1 C.B. 311; 79-95, 1979-1 C.B. 331; 78-276, 1978-2 C.B. 256; and 73-563, 1973-2 C.B. 24; IRS *Private*

c. *The MTA and LIRR Both Qualify as Political Subdivisions under the Hawkins and Shamberg Tests*

The Second Circuit also referred to decisions interpreting analogous federal statutes to aid in interpreting the term "political subdivision", which is not specifically defined in ERISA, and concluded that the MTA is a political subdivision of the State of New York.[8] Petitioner objects to the use of these tests, but fails to enunciate any alternative test.

(i) *The Hawkins Test*

In the leading case of *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971), this Court held that a utility district fell within the "political subdivision" exception to jurisdiction of the National Labor Relations Board ("NLRB") under the Labor Management Relations Act ("LMRA"). In *Hawkins*, the Court analyzed whether the defendant utility district was a "political subdivision" under the test employed by the NLRB. Under this test, an entity is a political subdivision if it is "either (1) created directly by the state so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." 402 U.S. at 604-05. The LIRR meets the second of these alternative tests. N.Y. Pub. Auth. Law § 1266(5). And, as the Second

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Rulings 82-17128, 81-33034, 80-17089, 79-17084, 79-14066, 79-09037, 79-02043 and 78-11044; *General Counsel Memorandum* 37715; DOL *Advisory Opinions* 85-10A, 81-14A; 80-50A; 80-27A; 80-19A and 79-83A; and PBGC *Opinions* 75-18, 81-2, 81-23, 81-30, 81-31 and 81-37.

8 It is appropriate to employ decisions interpreting terms under the Labor Management Relations Act ("LMRA") to interpret ERISA terms because these statutes are precursors to ERISA. Thus, in *Ottley v. Sheepshead Nursing Home*, 607 F. Supp. 952 (S.D.N.Y. 1985), *rev'd on other grounds*, 784 F.2d 62 (2d Cir. 1986), the court observed that the definitional provisions of the LMRA and ERISA as to the term "political subdivision" are "the same" because "ERISA encompass[es] definitions under the LMRA." 607 F. Supp. at 954 n.1.

Circuit found, the MTA meets both tests. 828 F.2d at 916, *citing* N.Y. Pub. Auth. Law § 1263(1)(a) & (7).

More than just meeting these tests, (i) the Members of the LIRR and MTA are identical and are appointed by the Governor with the advice and consent of the Senate, (ii) the LIRR has the extensive governmental powers listed above, (iii) the LIRR "performs an essential governmental function" and (iv) the LIRR depends for its existence on the taxing power of the State.

(ii) *The Shamberg Test*

In two leading cases, *Commissioner v. Shamberg's Estate*, 144 F.2d 998 (2d Cir. 1944), *cert. denied*, 323 U.S. 792 (1945), and *Commissioner v. White's Estate*, 144 F.2d 1019 (2d Cir. 1944), *cert. denied*, 323 U.S. 792 (1945), the Second Circuit defined the term "political subdivision" in construing the scope of the income tax exemption under the Internal Revenue Code, 26 U.S.C. § 103, for interest on obligations of a political subdivision of a state. In *Shamberg*, the Second Circuit analyzed whether the interest on bonds issued by the Port of New York Authority (the "Port Authority"), a public authority created by an interstate compact between New York and New Jersey, was tax-exempt.[9] In *White's Estate* the Second Circuit made the same analysis regarding interest on obligations of the Triborough Bridge Authority, which, like the MTA, was a New York public benefit corporation.[10]

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9 The Port Authority, which constructed and operated bridges and tunnels, had the power of eminent domain; was governed by a Board of Commissioners from New York and New Jersey; had a police force whose members were designated peace officers; could make and enforce regulations governing bridges and tunnels; was not subject to the New York or the New Jersey constitutional limitations on state and municipal debt; and its bonds and other obligations were not debts or obligations of New York or New Jersey.

10 The Triborough Bridge Authority continues to be a public benefit corporation, the Members of which now consist of the Chairman and thirteen Members of the MTA.

In *Shamberg* and *White's Estate*, the Second Circuit denoted as "sovereign" powers the power of eminent domain, the power to tax and the police power. The Second Circuit held in *Shamberg* and in *White's Estate* that to qualify as a political subdivision an entity need only exercise some of these sovereign powers. The Second Circuit, accordingly, held that the Port Authority and the Triborough Bridge Authority qualified as political subdivisions because they exercised sovereign state powers (even though they lacked the power to tax and their obligations were not state obligations). 144 F.2d at 1004-05; 144 F.2d at 1021. Applying the test enumerated in *Shamberg* and *White's Estate*, as well as the *Hawkins* test, the Second Circuit held in this action that the MTA clearly qualifies as a political subdivision of the State and that the LIRR was at least an agency or instrumentality of that political subdivision. 828 F.2d at 917. No plenary review is merited of this clear-cut and limited holding.

(iii) *The LIRR Has Qualified as a Governmental Entity since It Was Acquired by the MTA in 1966*

Petitioner contends that the LIRR is not a governmental entity because prior to 1980 the LIRR was not formally a New York State "public benefit corporation", but rather was a stock corporation. Cert. Petition at 26-28. This argument ignores the fact that, since its acquisition by the MTA in 1966, the LIRR has enjoyed a multitude of statutory sovereign powers and governmental privileges and immunities (see *supra* at 10-13). As the Second Circuit points out, "[s]ince that time, no private individual has held any beneficial interest in the LIRR." 828 F.2d at 915. Therefore, the argument that the LIRR was a for-profit corporation before 1980, and thus not the State's instrumentality, exalts form over substance. Quite simply, the LIRR is a governmental entity.[11] As the Second Circuit concludes:

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11 Petitioner also complains that LIRR employees technically were not "public employees" under State law until 1980. Cert. Petition at 8. But

"[t]he LIRR has been, in effect, a state-owned railroad since 1966 when it was acquired by the MTA. Every year since then, the LIRR has received massive state operating subsidies. LIRR employees, therefore, like other governmental employees, can depend on the state's taxing power to protect their right to retirement income." 828 F.2d at 918.

3. While the LIRR Plan Was Both Established *and* Maintained by a Governmental Entity, ERISA Merely Requires that a Plan Be Established *or* Maintained to Qualify as a Governmental Plan

Petitioner asserts that the Second Circuit "read out of ERISA the word 'established' altogether" in the governmental plan definition in 29 U.S.C. § 1002(32). Moreover, petitioner claims that the Second Circuit mistakenly chose a broad definition of "governmental plan" and that the ERISA governmental plan exemption covers only plans "established *and* maintained" by a governmental entity, not merely those "established *or* maintained." Cert. Petition at 19. Petitioner's assertion is both wrong and academic. It is wrong because the language of 29 U.S.C. § 1002(32) is unambiguous: it reads "established *or* maintained." It is academic because, as the Second Circuit explicitly held, "even if we agreed with Rose that the correct interpretation of § 1002(32) was *established and maintained*, we would still not conclude that the LIRR Plan was covered by ERISA, because the Plan was in fact established *and* maintained by the LIRR." 828 F.2d at 920 (emphasis in original).

The Plan, which is supported and financed directly by the LIRR (and indirectly by the State), unquestionably is "main-

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the controlling governmental plan exemption refers to plans established or maintained by a *governmental entity* for its employees. ERISA exempts governmental plans; the status of employees as government employees under state law has no independent relevance. ERISA states that the employees simply must be employees of employers that are states, political subdivisions or agencies or instrumentalities of any of the foregoing (*see* Government Br. at 23-26) (24a-26a).

tained" by the LIRR, a point conceded by petitioner. It is just as clear that the Plan also was "established" by the LIRR. As the Second Circuit held, "where the LIRR was acquired by a public entity and its former plan was amended *in its entirety*, the LIRR Plan was 'established' [within the meaning of ERISA] by the LIRR." 828 F.2d at 920-21 (emphasis added).

4. Concerns that Led Congress to Exempt Governmental Plans from ERISA Apply Squarely to the LIRR

Petitioner claims that "Congress meant to exclude as governmental only plans financed by *governments*," Cert. Petition at 16 (emphasis in original), and that "[t]he payment of subsidies to the LIRR by the State through the MTA is irrelevant, as neither is an 'employer' of LIRR employees." Cert. Petition at 30. The Second Circuit considered and rejected these arguments, stating that:

> Finally, the reasons for exempting governmental plans from ERISA apply with equal force to the LIRR. The LIRR has been, in effect, a state-owned railroad since 1966 when it was acquired by the MTA. Every year since then, the LIRR has received massive state operating subsidies. LIRR employees, therefore, like other governmental employees, can depend on the state's taxing power to protect their right to retirement income. *See* H.R. Rep. No. 807, 1974 U.S. Code Cong. & Ad. News at 4756-57. Moreover, in light of the state's past practice of funding the LIRR's operating deficits, any additional costs imposed on the LIRR as a result of complying with ERISA would most likely be borne, at least to some extent, by New York taxpayers. *See* H.R. Rep. No. 807, 1974 U.S. Code Cong. & Ad. News at 4830.

828 F.2d at 918.

The concerns that led Congress to exempt governmental pension plans from ERISA were that (1) the sudden imposition of a minimum funding requirement could create a considera-

ble, and unreasonable, burden for taxpayers and (2) the funding of public plans was generally regarded as adequate and secure because of governmental taxing authority. *See* H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4648; H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4670, 4756. As the Second Circuit found, these concerns apply squarely to the LIRR, because the LIRR depends for its existence on regularly mandated and substantial State, federal and local governmental funding. 828 F.2d at 917.

The LIRR's sources of revenue include farebox receipts, relatively insignificant freight and miscellaneous revenues and the very substantial subsidies it receives through the MTA from the State, federal and local governments.[12] State and local governmental subsidies principally are derived from State tax revenues dedicated to mass transportation and subsidies mandated by State law. Without these State funds, the LIRR would not have been able to exist, for it has operated at a staggering loss each year since its acquisition in 1966 by the MTA.[13] *See* 828 F.2d at 917. For the period 1976 through 1984, the revenues from direct State appropriations and from statutorily-

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12 Indeed, the New York State Legislature clearly contemplated that the MTA and its subsidiaries would depend on subsidies when it provided that the MTA is "self-sustaining" when it is able to pay its expenses "from revenue and *other funds or property* actually available to the authority and its subsidiary corporations." N.Y. Pub. Auth. Law § 1266(3) (emphasis added). These other funds are the State, local and federal subsidies statutorily dedicated or annually appropriated to the MTA. *See Weiss v. City of New York*, 52 Misc. 2d 391, 275 N.Y.S.2d 557 (Sup. Ct. N.Y. County 1966) and *City of New York v. New York Transit Authority*, 53 Misc. 2d 627, 279 N.Y.S.2d 278 (Sup. Ct. N.Y. County 1967) (the Transit Authority is "self-sustaining" when receiving city subsidies so long as the State Legislature enacts enabling legislation). The MTA certainly is "self-sustaining" when receiving funds directly appropriated or statutorily dedicated to the MTA by the State Legislature.

13 These losses have ranged from $4,151,000 in 1966 to $252,138,000 in 1984, the last year for which audited financial statements were available when the LIRR moved for summary judgment in the District Court.

mandated subsidies aggregated in excess of $3.2 billion, or more than 67% of the LIRR's expenses. The annual subsidies have ranged from approximately $129 million in 1976 to approximately $431.5 million in 1984.[14]

The immense mandated funding the LIRR receives from the State just to exist demonstrates that the Congressional concerns in exempting "governmental plans" apply squarely to the LIRR. Moreover, the extensive discovery taken by Rose further buttresses the determination that the Plan is a "governmental plan." As established in the depositions taken by Rose, the LIRR submits a budget each year to the MTA, which, in order to fund it, annually turns to the State for subsidies. 828 F.2d at 917. Because the funds available from farebox receipts and federal and local government subsidies are insufficient, James B. Huff, former Comptroller of the MTA, testified that "for all practical purposes, the State is the only source of funds to fund the Pension Plan for The Long Island Rail Road."[15]

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14 The dedicated annual operating subsidies include: (a) State mass transportation operating assistance (N.Y. Transp. Law § 18-b); (b) annual freight expense appropriations; (c) the operating surplus of the Triborough Bridge and Tunnel Authority, a State public benefit corporation (N.Y. Pub. Auth. Law §§ 553(12), 569-c, 1219-a(2)(b) & 1219-a(3)); (d) local operating assistance (N.Y. Transp. Law § 18-b); (e) local station maintenance assessments (N.Y. Pub. Auth. Law § 1277); (f) a portion of the State mortgage recording tax (N.Y. Tax Law § 261(1)); (g) a 1/4% additional state sales tax imposed in the MTA twelve-county Metropolitan Commuter Transportation District (N.Y. Tax Law § 1109); (h) an oil company franchise tax on 3/4% of gross receipts from sales of petroleum (N.Y. Tax Law §§ 301-12); (i) transportation and transmission company taxes (N.Y. Tax Law §§ 183, 184, 184-a, 186-b & 205); (j) for two years (1982 and 1983), 7% of the revenue from a unitary tax on oil corporations (N.Y. Tax Law §§ 171-a(2) & 211(4-a)); (k) a tax on gains derived from certain real property transfers (N.Y. Tax Law § 171-a and §§ 1440 *et seq.*; and (l) a surcharge on business taxes in the MTA Metropolitan Commuter Transportation District for the support of mass transit (N.Y. Tax Law §§ 171-a(2), 183-a, 184-a, 186-b, 209-b, 1455-b & 1505-a).

15 Huff Deposition at 20 (37a). A copy of pages 19 and 20 of the deposition of James B. Huff (pages 210-11 of the Joint Appendix in the Second Circuit) is annexed as Appendix D (36a-37a).

5. Imposition of ERISA's Requirements Would Result in Grave Financial Consequences that Congress Did Not Intend to Impose on State Supported and Controlled Entities

Petitioner argues that "[t]he State of New York and the MTA are most certainly not sureties for the LIRR's obligations (including its pension plan obligations), and neither one has *any legal obligations whatsoever* to subsidize the LIRR." Cert. Petition at 31 (emphasis in original). But the Second Circuit correctly observes that "[Rose's] argument ignores the fact that many governmental services are funded in the same manner. As a practical matter, the State of New York has demonstrated its commitment to sustain the LIRR for the past twenty years . . . ." 828 F.2d at 918.

The plain fact is that if the LIRR Plan is not a governmental plan, extreme and disastrous financial consequences would be visited on the LIRR, the State and, ultimately, the taxpayers—exactly what Congress wanted to avoid in providing the governmental plan exemption.[16]

If the Plan is not a "governmental plan," it would be subject not only to the survivorship benefit provisions of ERISA, on which Rose's complaint is based, but also to a panoply of other costly requirements. These include ERISA's minimum funding standards, which require an employer to fund pension benefits through contributions to a trust at a prescribed level; its vesting and benefit calculation rules, 29 U.S.C. § 1082, 26 U.S.C. § 412; the joint and survivorship annuity provisions; benefit accrual requirements, 29 U.S.C. § 1054, 26 U.S.C. § 411(b); plan termination insurance premiums payable to the PBGC, 29 U.S.C. §§ 1306-07; and many reporting and disclosure requirements. The application of these additional ERISA provisions to the LIRR Plans would result in hundreds of millions of dollars of additional costs to the LIRR. Indeed, the Plan's independent actuary has estimated that the LIRR would

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16 As the Second Circuit concluded, "any additional costs imposed on the LIRR as a result of complying with ERISA would most likely be borne, at least to some extent, by New York taxpayers." 828 F.2d at 918.

be required to contribute an additional $302 million to fund the LIRR Plans just through December 1984 should ERISA apply to the Plan, most of which would be borne by the taxpayer. Petitioner disputes none of this, nor could she.

Conclusion

This action involves the interpretation of a limited definitional provision of ERISA in a limited factual context. The decision of the Second Circuit is based on and wholly consistent with ERISA's statutory language and legislative history, judicial precedent, and the decisions, rulings and opinions of the expert agencies charged by Congress with enforcing and administering ERISA. Further, the Second Circuit's decision does not conflict with any decision of any other federal Court of Appeals. For all of the foregoing reasons, the LIRR respectfully requests that the Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

New York, New York
February 13, 1988

Respectfully submitted,

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APPENDICES

APPENDIX A

86-7942

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MARY ROSE,

Plaintiff-Appellant,

—v.—

THE LONG ISLAND RAILROAD PENSION PLAN, LONG ISLAND RAILROAD PENSION PLAN'S BOARD OF MANAGERS, LONG ISLAND RAILROAD PENSION PLAN'S JOINT BOARD ON PENSIONS APPLICATIONS, MORGAN GUARANTY TRUST COMPANY OF NEW YORK as Trustees of the Plan, T.P. MOORE and JOHN DOE, As members of the Plan Board of Managers, T.M. TARANTO, J.B. HUFF and H.J. LIBERT, As members of the Plan Board of Managers and the Joint Board on Pension Applications, E. YULE, W. STYZIAK and J. BOVE, As members of the Joint Board on Pension Applications and THE LONG ISLAND RAILROAD,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 86-7942

MARY ROSE,

Plaintiff-Appellant,

—v.—

THE LONG ISLAND RAILROAD PENSION PLAN, LONG ISLAND RAILROAD PENSION PLAN'S BOARD OF MANAGERS, LONG ISLAND RAILROAD PENSION PLAN'S JOINT BOARD ON PENSIONS APPLICATIONS, MORGAN GUARANTY TRUST COMPANY OF NEW YORK as Trustees of the Plan, T.P. MOORE and JOHN DOE, As members of the Plan Board of Managers, T.M. TARANTO, J.B. HUFF and H.J. LIBERT, As members of the Plan Board of Managers and the Joint Board on Pension Applications, E. YULE, W. STYZIAK and J. BOVE, As members of the Joint Board on Pension Applications and THE LONG ISLAND RAILROAD,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT OF INTEREST

This brief is submitted in response to the Court's invitation to the United States to submit its views at the oral argument of the instant case held on March 30, 1987.

When this case was previously before the Court in 1982, the Court vacated its initial decision in favor of the plaintiff below, Mary Rose, after a petition for rehearing by the Long Island Railroad ("LIRR"). In support of the petition, the [2] Secretaries of Labor and of the Treasury of the United States, the Pension Benefit Guaranty Corporation, and the State of New York, as *amici curiae*, expressed their view that the LIRR Pension Plan was a "governmental plan" within the meaning of Section 3(32) of the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. 93-406, 88 Stat. 832, 29 U.S.C. Section 1002(32). After remand to the District Court, plaintiff undertook substantial discovery and has raised new legal arguments. Now, on appeal of the District Court's decision against her, plaintiff-appellant has asserted that the present position of the Government is uncertain. After review of the present record in this case and the new arguments raised, the Government reaffirms its position that the LIRR Pension Plan was at all relevant times a "governmental plan" within the meaning of Title I of ERISA.

The Secretary of Labor, the Secretary of the Treasury, and the Pension Benefit Guaranty Corporation administer, interpret, and enforce ERISA Titles I, II, and IV, respectively.[1] As the Government stated in 1982, this case is exceptionally important. The Metropolitan Transit Authority's ("MTA") view that an adverse decision would be financially crippling at a time when it is attempting to rebuild the mass transit facilities of New York is [3] supported on the record. Moreover, a decision adverse to the LIRR might well have dramatic adverse financial impact upon other state and local governments

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1 The Secretary of Labor interprets, administers and enforces Title I of ERISA in consultation and coordination, where necessary, with the Secretary of the Treasury, who has similar and sometimes overlapping responsibilities under Title II of ERISA. In addition, the Secretary of Labor chairs, and the Secretary of the Treasury is a member of, the Board of Directors of the PBGC, which Congress created in Section 4002 of Title IV of ERISA, for the purposes, among others, of guaranteeing certain benefits under covered pension plans.

throughout the country.[2] Further, ERISA was designed specifically to remedy abuses and other detrimental practices which had historically occurred in plans maintained by private businesses. The imposition by federal agencies of the requirements of ERISA—including minimum vesting, participation and funding standards, as well as detailed regulation of administrative, investment, and other management duties, all subject to administrative, civil, and criminal investigation and prosecution by federal agencies—upon entities owned and controlled by the state or its agencies and instrumentalities, such as the LIRR may reasonably be expected to strain the relationship between the Federal Government and the States, as well as stretch the finite resources of the Federal Government to police the private pension plans for which ERISA was enacted. Finally, the Pension Benefit Guaranty Corporation could face massive, unanticipated liabilities if plans similar to that of the LIRR are terminated. These potential consequences are of the sort that Congress intended to preclude in enacting the "governmental plan" exemption of ERISA. [4] For these reasons, the Government has a direct interest in the outcome of this litigation.

STATEMENT OF THE ISSUE PRESENTED

Whether the LIRR Pension Plan is a "governmental plan" within the meaning of Section 3(32) of ERISA (29 U.S.C. Section 1002(32)).

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2 The implications of the "governmental plan" exemption extend beyond the joint and survivor annuity requirement of Title I involved in this case. A similar exemption is provided in Section 414(d) of the Internal Revenue Code of 1954 (26 U.S.C.), as added by Title II of ERISA, for "governmental plans" with respect to the minimum participation, vesting and funding requirements for trust qualification under Section 401 of the Internal Revenue Code. In addition, the benefit-guaranty obligations of PBGC do not extend to "governmental plans" as similarly defined in Section 4021(b)(2) of ERISA, 29 U.S.C. Section 1321(b)(2).

STATEMENT OF THE CASE

Appellant Mary Rose is the surviving spouse of Richard A. Rose, who died of leukemia in 1976. (A. 674, 989).[3] Mr. Rose was an employee of the LIRR and a participant in the LIRR Pension Plan (the "Plan"). (*Ibid.*) Although, by 1975, he had met the age and service requirements under the plan for a pension, he never retired, having died while he was still working.

Under the plan (A. 46), Mr. Rose had the right to elect survivorship benefits—*i.e.*, that a pension be paid to his wife upon his death. (A. 53-54, 364.) If he had chosen this alternative, benefits payable upon his retirement would be reduced to reflect the actuarial value of Mrs. Rose's potential annuity. Mr. Rose did not make this election.[4] (*Ibid.*) Thus, upon Mr. Rose's death, Mrs. Rose was not entitled, under the express terms of the Plan, to receive pension benefits.

In 1976, Mrs. Rose made a formal application to the LIRR Pension Plan for a survivor's annuity. (A. 677). The application **[5]** was subsequently denied on the basis that Mr. Rose had not filed an election for such annuity. (A. 365, 678.)

Mrs. Rose instituted this action on June 5, 1981. On December 11, 1981, the District Court for Eastern District of New York (Bramwell, J.) granted the LIRR's motion to dismiss on the grounds that the Plan was a "governmental plan" exempt from the requirements of ERISA. (A. 10B.)

On appeal, this Court rendered an opinion on September 28, 1982, which held that the plan was not a "governmental plan." (A. 793.) The LIRR petitioned for rehearing, which was granted by this Court on December 23, 1982. (A. 795.) The United States and the State of New York had filed briefs as *amici curiae* in support of the position that the Plan was a "governmental plan." (A. 156-163, 121-149.) On rehearing, the

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3 "A." references are to the Joint Appendix submitted by the appellant.

4 At the time of Mr. Rose's death, under ERISA, Section 205, 29 U.S.C. Section 1055, plans covered by Title I must, in general, have provided survivorship benefits unless the participant elected a single life annuity.

Court vacated its decision, withdrew its opinion, and remanded the case to the District Court to consider the "significant matters" brought to the Court's attention on rehearing. (A. 795)

On remand, after discovery, the LIRR and Mary Rose both filed motions for summary judgment. (A. 103, 724.) The District Court granted the LIRR's motion, and denied Mary Rose's motion. (A. 1045.) The District Court stated that the plain language and legislative history of the ERISA exemption "on balance point decidedly to the conclusion that the Long Island Railroad Plan falls within the exemption." (A. 1047.) The court ruled that the MTA is a political subdivision of New York, and that the LIRR is [6] an agency of the MTA and "perhaps" also of the State of New York. (A. 1047-1048.)[5]

By letter dated September 30, 1986, Mary Rose requested reconsideration. (A. 1049). The District Court entered an order dismissing the complaint on October 16, 1986 (A. 1053). Judgment was entered on October 21, 1986. (A. 1056.) Mary Rose timely filed a notice of appeal on November 5, 1986. (A. Vol. I, Docket Entries.)

SUMMARY OF ARGUMENT

ERISA is complex and far-reaching pension legislation which was designed to remedy abuses and other detrimental practices that had historically occurred in the *private* sector. The pervasive federal standards mandated by ERISA, enforced by administrative and civil proceedings, as well as criminal prosecutions by federal agencies, were not designed for nor intended to cover plans of entities owned and controlled by the state or its agencies or instrumentalities. Thus, Congress enacted a broad governmental exemption, covering not merely plans of the federal and state governments, but also plans of

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5 The District Court also referred to its earlier conclusion that the LIRR is probably a political subdivision, but, in any event, is clearly an agency or instrumentality of the MTA." (A. 1047, 10I-J.)

political subdivisions of a state, and of agencies and instrumentalities of any of the foregoing.

The instant case involves a prime example of the reasons why Congress exempted such plans. The governmental ownership, control, funding and powers, as well as the public purpose, of the LIRR overwhelmingly establish its governmental nature and nexus to the State of New York. Federal regulation of the LIRR [7] plan would deeply implicate the State of New York's financial interests, as well as undercut its prerogatives. This is precisely the sort of federal intrusion that the governmental plan exemption was designed to preclude.

The appellant's theory that the exemption should be narrowly construed would subvert Congress' intent and is entirely unsupported by relevant authorities. To the contrary, in *NLRB* v. *Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971), the Supreme Court broadly interpreted and applied a governmental exemption under analogous legislation and circumstances. Federal regulation of entities owned and controlled by the states or their agencies or instrumentalities simply should not be presumed under ERISA.

Moreover, appellant's contention that the exemption only applies to plans "established" by a governmental entity is directly contrary to the controlling statutory provision, which provides that plans established *or* maintained by a governmental entity are exempt. Appellant's further contention that LIRR is not an "instrumentality" of a "government" is, *inter alia*, wrong on the facts. The record in this case clearly demonstrates that the LIRR is an agency, instrumentality or political subdivision of the State of New York. Accordingly, the LIRR Plan meets the exemption test under ERISA, Sections 4(a), 3(32).

Finally, appellant's contention that the governmental exemption did not apply prior to the 1980 conversion of the LIRR into a "public benefit corporation," when its employees became more fully protected "public employees" under state law, is without merit. Congress, based upon concerns of federalism, decided to exempt from ERISA regulation the entire category of [8] governmental plans, regardless of the degree of protec-

tion that each plan may afford to covered employees. A plan is not "governmental" because it is generous or secure, or private because it is not. Since LIRR is clearly a governmental entity within the scope of ERISA Sec. 3(32), it is irrelevant whether or not the pension plans of LIRR employees and the pension plans of "public employees" (as defined by state law) were equally secure.

The judgment of the District Court should be affirmed.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THE LIRR PENSION PLAN IS A "GOVERNMENTAL PLAN" WITHIN THE MEANING OF TITLE I OF ERISA

A. *Introduction—The Statutory Scheme*

The consequences of a determination that a pension plan is covered by ERISA (Pub. L. No. 93-406, 88 Stat. 1009, as amended) are far-reaching. As described by the Supreme Court, ERISA is a "comprehensive and reticulated statute." *Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980). The statute itself is an "interlocking, interrelated, and interdependent remedial scheme." *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134, 145 (1985). The regulations issued by the federal agencies charged with implementing the statute are necessarily massive and complex. See 26 C.F.R. Secs. 1.401-1, *et seq.*, Sec. 11.401(a)-11, *et. seq.*, Sec. 54.4971-1, *et seq.* and Sec. 54.4975-1, *et seq.*; 29 C.F.R. Sec. 2509.75-1, *et seq.*, and Secs. 2601.1, *et seq.*

[9] Title I of ERISA, Sections 1-515, 29 U.S.C. Sections 1001-1145, administered by the Secretary of Labor, dictates substantive standards which must be met by private pension plans pertaining to the coverage, accrual, vesting, and funding of pension benefits. See ERISA, Secs. 201-207, 301-305. The statute details various reporting, disclosure, and record-keeping requirements, as well as fiduciary standards. See ERISA, Secs. 101-107, 209-210, 401-411. The Secretary of

Labor is granted comprehensive investigatory powers. ERISA, Sec. 504. The multiplicity of substantive and procedural requirements are enforced through criminal penalties as well as civil proceedings. ERISA, Secs. 501-503.

Title II of ERISA, Sections 1011-1052, see 26 U.S.C. Sections 401, *et seq.*, establishes various substantive and procedural requirements pertaining to the qualification of pension plans for favorable tax treatment, which is generally considered crucial to the success of a pension program.[6] Title II is administered by the Secretary of the Treasury (the Internal Revenue Service), who, of course, also has broad investigatory powers. Violation of Title II standards may lead not only to disqualification pension plans, but to the imposition of additional taxes or penalties. See, *e.g.*, 26 U.S.C. Sec. 4971 (excise tax imposed where funding requirements not met).

[10] Title III of ERISA, Sections 3001-3043, 29 U.S.C. Sections 1201-1243, contains provisions designed to coordinate enforcement efforts of the various responsible federal agencies, and also provides for further study of matters which could be the subject of future amendments to ERISA or other pension legislation. In particular, ERISA mandated a study of "retirement plans established and maintained or financed (directly or indirectly) by the Government of the United States, by any State * * * or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." ERISA, Sec. 3031, 29 U.S.C. Sec. 1231.

Title IV of ERISA, Sections 4001, *et seq.*, 29 U.S.C. Section 1301, *et seq.*, is administered by the Pension Benefit Guaranty Corporation ("PBGC"), a wholly-owned United States Government corporation. ERISA, Sec. 4002, 29 U.S.C. Sec. 1302. The PBGC also has broad rulemaking, investigatory, and enforcement authority. ERISA, Secs. 4002, 4003, 29 U.S.C. Secs. 1302, 1303. In a function analogous to that of the

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6 Governmental plans are exempt from Title II requirements regarding minimum funding, vesting, participation, and joint and survivor annuity requirements. Title II does, however, contain certain requirements applicable to governmental plans. See, *e.g.*, 26 U.S.C. Sec. 415 (benefit/contribution limitations).

Federal Deposit Insurance Corporation, the PBGC guarantees the payment of certain pension benefits in covered plans which terminate with insufficient assets to pay those benefits.[7] The PBGC is funded primarily through compulsory premiums charged to plans maintained by private businesses. 29 U.S.C. Secs. 1302(g)(2), 1306, 1307. The PBGC is not funded by, nor does it guarantee, plans established and maintained by "the government of any state or political [11] subdivision thereof, or by any agency or instrumentality of any of the foregoing." ERISA, Sec. 4021(b)(2), 29 U.S.C. Sec. 1321(b)(2).[8]

ERISA was enacted in 1974, after nearly a decade of study (*Nachman*, *supra*, 446 U.S. at 361), by a vote of 85 to 0 in the Senate and 407 to 2 in the House of Representatives. III Legislative History of ERISA, Senate Committee on Labor and Public Welfare, (GPO, April, 1976) (hereinafter "Legis. Hist.") at 4718, 4835. The legislative history is replete with discussion of historical abuses and other detrimental practices in the *private* sector. *E.g.*, II Legis. Hist. 1599, 1634, 1666, 1767, 1830, 1866; III Legis. Hist. 4658, 4665, 4710, 4749, 4795, 4799. The statutory scheme was the subject of years of deliberation by and negotiation among *private* business and labor groups, and interested federal agencies. State and local governments had no comparable participation in the process. The pervasive substantive and procedural requirements of ERISA simply were neither designed for, nor intended to cover, entities owned and controlled by states or their agencies or instrumentalities. Moreover, in the 13 years that have passed since Congress mandated the study of possible federal regulation of

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7 The PBGC is also charged with the duty "to encourage the continuation and maintenance of voluntary private pension plans * * * *." ERISA, Sec. 4002(a)(1), 29 U.S.C. Sec. 1302(a)(1).

8 The Pension Benefit Guaranty Corporation has independent litigating authority (ERISA, Sec. 4002(b)(1), 29 U.S.C. Section 1302(b)(1)) and has joined with the United States in the preparation and submission of the instant brief, and concurs in the views expressed herein. The PBGC considers the LIRR plan to be a government plan exempt from Title IV coverage and has never collected the premiums mandated by Title IV for private plans from the LIRR.

non-private plans, Congress has not chosen to enact such legislation. See ERISA, Sec. 3031(a), 29 U.S.C. Section 1231(a). **[12]**

B. *Plans maintained by an agency or instrumentality of a state, or political subdivision thereof, such as the LIRR Pension Plan, are expressly exempted from coverage under Title I of ERISA.*

The appellant's claim under ERISA must fail unless Title I of ERISA (specifically, Sections 205(a) and (e), 29 U.S.C. Sections 1055(a) and (e)), applied to the LIRR Plan prior to 1977. Section 4(b) of Title I of ERISA, 29 U.S.C. Section 1003(b), provides in pertinent part: "the provisions of this title shall not apply to any employee benefit plan if—(1) such plan is a governmental plan (as defined in section 3(32))."[9] Section 3(32) of Title I, 29 U.S.C. Section 1002(32), provides, in pertinent part:

> The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

The ultimate goal of statutory interpretation is the effectuation of Congressional will. *United States* v. *American Trucking Ass'n*, 310 U.S. 534, 542 (1940). The starting point in search of that goal is the language used by the legislators. *Reiter* v. *Sonoton Corp.*, 442 U.S. 330, 337 (1979). Other aids are the structure of the statute and its legislative history. *United States* v. *American Trucking Ass'n*, 310 U.S. at 543-544. In addition, great weight is accorded to the interpretation of the statute by those charged with its implementation. *Id.* at 549; **[13]** *Red*

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9 Thus, appellant's suggestion (Br. 3), without citation of authority, that the LIRR Plan may be a private plan for the purpose of vesting, but "governmental" for the purpose of funding, is contrary to the express terms of the statute and clearly wrong.

Lion Broadcasting Co. v. *FCC*, 395 U.S. 367, 381 (1969) ("the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong"); *Belland* v. *PBGC*, 726 F. 2d 839, 843 (D.C. Cir. 1984), cert. denied, 469 U.S. 880 (1984). Here, these relevant guides to statutory interpretation lead to the conclusion that the LIRR pension plan is a governmental plan under Section 3(32) of Title I and thus is not covered by ERISA.

A natural and sensible reading of the statutory language of Section 3(32) of Title I includes, within the term "governmental plan", plans established or maintained by the United States government, a state government, a political subdivision of the state, and any of their agencies or instrumentalities. It is not limited only to plans established or maintained directly by states, or political subdivisions which have all the attributes of governments. Nor is it limited to the first tier agencies or instrumentalities. States or political subdivisions may use multitier agencies or instrumentalities, but every tier is essentially an agency or instrumentality of the state or political subdivision that owns and controls it. Indeed, any other approach would undermine the states control over the processes by which they use their instrumentalities to effect their public purposes.

An analysis of the purposes underlying the "governmental plan" exemption supports this construction. The problems requiring national legislation arose with respect to pension plans operated by the private sector. See p. 10, *supra*. At the time ERISA was enacted, Congress believed that many public **[14]** sector plans were adequate with respect to vesting and to funding (because of the taxing power). See H.R. Rep. No. 533, 93 Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4648; H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4670, 4756. However, Congress clearly recognized that there were flaws in public, as well as private sector, pension programs:

> The Committee is convinced that legislation seeking reform in the public sector must proceed with a thorough study of the effects of such proposals. There are literally

> thousands of public employee retirement systems operated by towns, counties, *authorities* and cities in addition to the state and Federal plans. *Eligibility, vesting and funding provisions are at least as diverse as those in the private sector with the added uniqueness added by the legislative process. For this reason the Committee is convinced that additional data and study is necessary before any attempt is made to address the issues of vesting and funding with respect to public plans.* [II Legis. Hist. at 2356 (House Education and Labor Committee (emphasis added).]

Congress also realized that many public plans were funded on a "pay as you go" basis, and that ERISA's funding standards would require an immediate and, in Congress's judgment, unreasonable burden on state taxpayers. See H. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4648. Significantly, Congress did not choose to enact standards for defining and regulating inadequate public plans. To the contrary, it exempted the entire class of governmental plans (ERISA, Sec. 4(b), 29 U.S.C. Sec. 1003(b)) and ordered further study of the **[15]** matter because of the particular problems that would be involved (ERISA, Sec. 3031, 29 U.S.C. Section 1231).[10] In other words, with

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10 ERISA Section 3031 provides:

> Sec. 3031(a). The Committee on Education and Labor and the Committee on Ways and Means of the House of Representatives and the Committee on Finance and the Committee on Labor and Public Welfare of the Senate shall study retirement plans established and maintained or financed (directly or indirectly) by the Government of the United States, by any State (including the District of Columbia) or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. Such study shall include an analysis of—
>
> (1) the adequacy of existing levels of participation, vesting, and financing arrangements,
>
> (2) existing fiduciary standards, and
>
> (3) the necessity for Federal legislation and standards with respect to such plans.

respect to both funding and benefits, Congress opted to leave the crucial decisions as to priorities and timing of state expenditures to the states. Clearly, at the heart of this decision were concerns of federalism. See *Feinstein* v. *Lewis*, 477 F. Supp. 1226, 1261 (S.D.N.Y. 1979), aff'd, 622 F. 2d 573 (2d Cir. 1980) (the purposes of ERISA's governmental plan exemption is "to refrain from interfering with the manner in which the state and local governments operate employee benefit systems.")

[16] Congress's categorical refusal to regulate plans of public entities under ERISA and its decision to preserve local perogatives hardly suggests a narrow reading of the governmental plan exemption. Thus, the appellant's primary contention (Br. 11), that the "governmental plan" exemption here should be narrowly construed, contravenes the purposes of the statute. Congress's concerns of federalism and of imposing standards designed for private plans and enforced by federal agencies upon state-related entities, Congress's recognition that further study was required with respect to the legislation regulating such public entities, and Congress' subsequent choice *not* to regulate such entities at the current time, all indicate that narrow construction—*i.e.*, broad federal pension regulation of entities owned and controlled by the state or its agencies or instrumentalities was not intended.

The only ERISA case cited by the appellant to support the contrary proposition, *Connolly* v. *PBGC*, 581 F. 2d 729, 732 (9th Cir. 1978), cert. denied, 440 U.S. 935 (1979), involved an unquestionably *private* plan which was clearly covered by ERISA, but was argued to be exempt from the Title IV insurance guaranty because it allegedly kept "individual accounts" within the meaning of ERISA, Section 4021(b)(5), 29 U.S.C. Section 1321(b)(5). *Id.* at 733. Moreover, the Court of Appeals' conclusion that the "individual account" exemption did not apply, just as PBGC had argued, was reached in light

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In determining whether any such plan is adequately financed, each committee shall consider the necessity for minimum funding standards, as well as the taxing power of the government maintaining the plan.

of the Court's "great deference to the PBGC in the construction and application of ERISA." *Id.* at 730. *Connolly* does not support the appellant's position here.

More to the point is the Supreme Court's construction of a *governmental* exemption under the Labor Management Relations [17] Act, 29 U.S.C. Section 141 *et seq. NLRB* v. *Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971). That Act, like ERISA, is remedial,[11] but the Supreme Court construed the exemption broadly so as to cover a quasi-governmental entity (a public utility district). *Id.* at 604-608. In short, it should hardly be presumed that Congress intended to regulate state-related, quasi-governmental entities under ERISA.

C. *The LIRR is a governmental entity within the plain language, and consistent with the purposes of, the "governmental plan" exemption of ERISA*

In our view, this case does not present a borderline question. The governmental ownership, control, funding, and powers, as well as the public purpose, of the LIRR overwhelmingly establish its governmental nature and nexus to the State of New York and the MTA.

In 1965, the MTA was created by the State of New York to acquire the LIRR and to preserve and improve local commuter transportation. 1965 N.Y. Laws, ch. 324. The State of New York had determined that the deterioration of the LIRR constitutes a serious threat to the economic well-being of the state. *Id.* The New York State Legislature issued findings and declarations to the effect that MTA would be charged with the "essential public purpose" of strengthening and improving commuter services of "vital importance to the commerce, defense and general welfare [18] of * * * the state, and the

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11 See fn. 8, *infra*; see also *NLRB* v. *Metallic Building Co.*, 204 F. 2d 826 (5th Cir. 1953), cert. denied, 347 U.S. 911 (1953); *Philip Carey Manufacturing Co.* v. *NLRB*, 331 F. 2d 720 (6th Cir. 1964), cert. denied, 379 U.S. 588 (1965); *Trimly Valley Iron & Steel Co.* v. *NLRB*, 410 F. 2d 1161 (5th Cir. 1969).

nation." In establishing the MTA, the State of New York itself expressly undertook "to take appropriate measures and assume responsibilities for the preservation of such essential services." *Id.*

The State of New York ultimately controls the MTA and the LIRR through its power to appoint the members who govern those entities. N.Y. Pub. Auth. Law Sections 1263, 1266. Moreover, the State of New York financed the acquisition of the LIRR, and the State's undisputed massive subsidies have been necessary to the continued operation of the MTA and LIRR. 1967 N.Y. Laws chs. 715, 718; A. 277-287, 367-368.

The LIRR has been a wholly-owned subsidiary of the MTA at all relevant times, and, as such, has all the "privileges, immunities, tax exemptions, and other exemptions * * *" of the MTA. N.Y. Pub. Auth. Law Sec. 1266. Both the MTA and the LIRR are exempted from state and local taxes (N.Y. Pub. Auth. Law Sec. 1275), and their facilities and operations are not under the jurisdiction of city or other local governments (N.Y. Pub. Auth. Law Sec. 1260 *et seq.*). The State of New York delegated powers to the MTA and the LIRR commensurate with what the legislature declared was their "essential governmental function" (N.Y. Pub. Auth. Law Sec. 1264), including eminent domain (N.Y. Pub. Auth. Law Sec. 1267), rulemaking authority which supersedes local regulations (N.Y. Pub. Auth. Law Section 1266), police powers (N.Y. Crim. Proc. Law Sec. 1.20(34)(1), broad investigatory authority (N.Y. Pub. Auth. Law Sec. 1265), and after public hearing, rate-setting authority (N.Y. Pub. Auth. Law Section 1266). Violation of **[19]** certain rules promulgated by the MTA or LIRR are punishable by fine or imprisonment. *Id.*

In *NLRB* v. *Natural Gas Utility District of Hawkins County*, *supra*, 402 U.S. 600, the Supreme Court ruled that a Tennessee utility met the "political subdivision" exemption under the Labor Management Relations Act, 29 U.S.C. Sections 141 *et seq.*[12] It is clear, and, indeed, undisputed, that the MTA and

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12 The Supreme Court agreed with the NLRB that an entity is a "political subdivision" if it is either administered by persons who are

the LIRR meet the "political subdivision" criteria under *Hawkins*. See *Id.* at 604-608; (A. 791-792); *Capers* v. *LIRR*, 429 F. Supp. 1359 (S.D.N.Y. 1981), aff'd, 573 F. 2d 1291 (2d Cir. 1977). Even more to the point, in the instant case, the MTA and the LIRR have a nexus to the State of New York and have been granted governmental powers from the State which are highly analogous to the relationship between the quasi-governmental entity and the state considered in *Hawkins*. As we have noted, the Supreme Court in *Hawkins* held that the utility there was a political subdivision, reversing the NLRB's decision to the contrary.

[20] In light of the pervasive governmental ownership, funding, control, and powers of the MTA and LIRR, and their nexus to the State of New York, the District Court was clearly correct that, at a minimum, the MTA is a political subdivision of the State of New York. And, of course, its wholly-owned subsidiary, LIRR, is an agency or instrumentality of MTA. Alternatively, these same factors demonstrate, as the district court suggested, that the LIRR is a political subdivision, agency, or instrumentality of the State of New York.

Appellant's contention on this appeal (Reply Br. 4), that the "governmental plan" exemption does not apply because the LIRR Plan was not "established" by a governmental entity, is without merit. The factual predicate for this claim is, at best, questionable. See LIRR Br. 41-43. More importantly, it is

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responsible to public officials or the electorate, or created by the state so as to constitute a department or administrative arm of the government. *Id.* at 604-605.

Both the LMRA and ERISA were enacted to strike what Congress regarded as an appropriate balance between private business and labor organizations. See H. Rep. No. 533, 93d Cong. 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 4647. Thus, *Hawkins* is persuasive, although not controlling, precedent with regard to exemptions covering quasi-governmental entities from private business/labor, remedial legislation. See, *Feinstein* v. *Lewis*, 477 F. Supp. 1256, 1259 (S.D. N.Y. 1979), aff'd, 622 F. 2d 573 (2d Cir. 1980). Indeed the factors considered in *Hawkins* are quite obviously related to Congress' reasons—primarily concerns of federalism—for exemption of state-related entities from ERISA.

undisputed that the Title I "governmental plan" exemption controls the outcome of this case, and that provision exempts a plan "established *or* maintained" by a governmental entity. ERISA, Sec. 3(32), 29 U.S.C. Sec. 1002(32).[13] At a minimum, the LIRR (if not MTA and the State [21] of New York, as well) maintained the plan at all times relevant here. Thus, it matters not whether the LIRR Plan was originally "established" by a private or governmental entity.

Appellant's further contention (Br. 21-27) that the exemption does not apply because neither LIRR nor MTA is a "government" is also without merit. First, as we have discussed, both are political subdivisions, agencies, and/or instrumentalities of the State of New York. Thus, even assuming that appellant correctly construes Section 3(32) to require that an exempt plan be maintained by a government or instrumentality of a government, that "requirement" is met here.

At all events, appellant's narrow construction of the statute is at odds with both the purpose of the statute,[14] as

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13 Where a plan is maintained by a governmental entity, the nature of the entity which established the plan in the distant past bears no relationship to Congress's concerns in enacting the governmental plan exemption—noninterference with current state and local pension matters—nor any other significant concerns that we can identify. (Nothing in the legislative history indicates Congress ever focused upon the significance or meaning of "established" in this context.) Thus, although the "governmental plan" definitions in Title II and Title IV, by the terms of the statute, cover plans maintained *and* established by governmental entities, the agencies with enforcement responsibility have construed this language to avoid frustrating Congress' intent. *E.g.*, PBGC Op. Ltr. 75-44 (term "established" construed so that "plan maintained by a public agency or political subdivision which has been taken over from a private business is excluded from the provisions of Title IV"); see also PBGC Op. Ltr. 75-45.

14 Appellant's suggestion that a narrow construction is justified because only a "government" has the necessary taxing power to fund "governmental plans" is patently frivolous since, even under appellant's construction, the statute would cover an agency or instrumentality (which is without taxing power) of a government. See *Commissioner* v. *Shamberg*, 144 F. 2d 998, 1005 (2d Cir. 1944), cert. denied, 323 U.S. 792 (1945), wherein the

[22] pointed out *supra*, pp. 13-14, and analogous provisions of the statute itself. For purposes of assigning responsibility for a pension plan, Title I of ERISA defines an "employer" as an individual or entity "acting directly as an employer, or *indirectly* in the interest of an employer, in relation to an employee benefit plan * * *." ERISA, Sec. 3(5) and (9); 29 U.S.C. Sec. 1022(5) and (9). Further, during the time period at issue here, Title IV of ERISA provided that the "employer" responsible for the plan was not merely the direct plan sponsor, but also all other trades or businesses under *common control*. ERISA, Sec. 4001(b), 29 U.S.C. Sec. 1301(b) (Supp. 1976). Under Title II, various provisions are also enforced by reference to the entire chain under common control. 26 U.S.C. Secs. 414(b), 414(c). The point here, of course, is *not* that the State of New York formally "owned" the MTA or LIRR,[15] but rather that the above provisions of ERISA demonstrate Congress's intent to pierce the form of an organization to effectuate the purposes of the statute. See *PBGC* v. *Ouimet Corp.*, 711 F. 2d 1085, 1089-90 (1st Cir. 1983), cert. denied, 464 U.S. 961 (1984). Indeed, Congress defined governmental plans, for the pur-

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Court opined that the lack of taxing power was not controlling in determining whether the part of New York Authority was a political subdivision of a state for purposes of exempting from federal taxation the interest on its obligations under the predecessor of Section 103(a)(1) of the Internal Revenue Code of 1954. See also *Philadelphia National Bank* v. *United States*, 666 F. 2d 834 (3d Cir. 1981); Rev. Rul. 73-563, 1973-2 Cum. Bull. 24.

Of equal irrelevance is the fact that the LIRR plan was set up pursuant to a collective bargaining agreement rather than by statute. The exemption is plainly applicable in circumstance where the state itself engages in collective bargaining to set up a pension plan for its employees. The state's interest is not diminished where, as here, an instrumentality that the state controls utilizes the collective bargaining process. Indeed, this Court affirmed a district court's conclusion that the fact that a plan is collectively bargained does not prevent exemption under ERISA Section 3(32). *Feinstein* v. *Lewis*, *supra*.

15 We note, however, that in *United Transportation Union* v. *LIRR*, 455 U.S. 678, 682 (1982), the Supreme Court referred to the LIRR as a "state-owned railroad."

pose of the mandated study, as plans "maintained or financed (*directly* or *indirectly*) * * * by any State * * * or political subdivision thereof, or any agency or **[23]** instrumentality of any of the foregoing." ERISA Sec. 3031, 29 U.S.C. Sec. 1231 (emphasis added).[16]

Regardless of the form of ownership, in substance, federal pension regulation of the LIRR would deeply implicate the interests and prerogatives of the State of New York, irrespective of the State's historical choice to place formal ownership of LIRR in the MTA rather than in its own name. This is the very result that the governmental plan exemption was intended to preclude. The risk of such federal interference is obviously why Congress chose to exempt *political subdivisions*, *agencies*, and *instrumentalities*, as well as state governments. ERISA, Sec. 3(32).

The appellant also contends (Br. 13-14) that the Title I governmental exemption did not apply prior to the formal conversion of the LIRR into a "public benefit corporation" in 1980. Appellant argues that this is so because, prior to 1980, the LIRR employees were not "public employees" and the LIRR was a "private, for-profit stock corporation." These arguments are also without merit.

To begin with, the fact that prior to 1980, LIRR employees were not characterized as "public employees" under state law does not demonstrate that, for the purposes of ERISA, they were not employed by an entity whose plans are eligible for the "governmental plan" exclusion. The construction and application of the governmental exemption is a matter of federal rather than state **[24]** law. See *NLRB* v. *Hawkins*, *supra*, 402 U.S. at 603-604; *Jerome* v. *United States*, 318 U.S. 101, 104 (1943). Since the State of New York exercises pervasive direct and indirect control over the finances and operations of the LIRR (which is owned by a state agency) by way of massive year to year subsidies and its power of appointment of LIRR

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16 We note that the fact that a fundamentally private entity may receive governmental subsidies or other governmental financing does not mean, of course, that it is an entity whose pension plan would be entitled to the "governmental plan" exemption. See PBGC Op. Ltr. 81-13.

directors, the state law distinction between "public employees" and LIRR employees is not important with respect to Congress' concerns of federalism. A state is, of course, free to choose different benefits and protections for those who are employed by it, its agencies or entities owned and controlled by the state or its agencies. In fact, that very power of choice was demonstrated here, when the State of New York simply converted the LIRR employees to official "public employees" in 1980.

In any event, regardless of whether the LIRR employees may be considered employees of the State of New York, they were clearly employees of an agency or instrumentality of New York, or a political subdivision thereof. That is plainly all that the statute requires. ERISA, Sec. 3(32). Therefore, appellant's further argument that the pensions of "public employees" were better protected than those of LIRR employees, even if true, is simply beside the point. Moreover, as discussed *supra*, pp. 13-14, Congress decided to exempt the entire category of governmental plans, rather than exempt plans on a case by case basis depending upon the degree of protection that each plan afforded. Indeed, many states and local governments, unlike New York, are not subject to a *state* constitutional provision that retirement "benefits * * * shall not be diminished or impaired." McKinney's Const., Art. V, **[25]** Sec. 7.[17] At bottom, Congress chose to leave these matters to state and local authorities, rather than dictate minimum federal standards, at least pending further study.

Appellant's argument that the LIRR was a private corporation is wrong on the facts and, in any event, irrelevant as a matter of law. LIRR was, beyond any doubt, publicly owned

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17 In this regard, the taxing power of a government only guarantees the funding of plans to the extent that the government chooses, on a year to year basis, to appropriate the funds to do so. Thus, the decision of a state to fund an instrumentality, as New York State funds the LIRR, is not fundamentally different from the decision of a government to fund a pension plan of its *direct* employees. That New York, as a matter of state law, may have constitutionally limited the state legislature's prerogative does not change the fact that the state controls the funding and benefits of its pension programs.

at all relevant times by the MTA. And even if the LIRR's operations had not depended upon massive state subsidies, and it had been profitable, that fact would not change the overwhelmingly governmental nature of the LIRR. See pp. 16-18, *supra*.[18] A state or other governmental entity clearly may charge for its services, and if it happens to make a "profit" in a discrete endeavor, that hardly turns the state or governmental entity into a private enterprise.

Finally, the fact that the LIRR was a corporation whose stock was wholly owned by a public authority, rather than formally denominated itself as an "authority," "agency," etc., is without significance here. Compare ERISA, Sec. 4002, 29 U.S.C. Sec. 1302 **[26]** (PBGC is a wholly-owned Government *corporation*; the United States, in general, is not liable for PBGC's obligations.) It is obviously the nature of the entity, rather than its form, that is controlling. LIRR was simply not privately owned or controlled at any relevant time. Moreover, Congress enacted the governmental exemption to cover the distinctly broad concepts of "agency" *or* "instrumentality." At a minimum, the LIRR meets that test.

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18 Appellant's observation that many private utilities and railroads may be granted certain quasi-governmental powers does not aid her cause. If such utilities or railroads were, like the LIRR, wholly owned by a governmental entity, as well as funded and controlled by a state or an agency or instrumentality thereof, they too would be exempt from ERISA coverage.

CONCLUSION

The decision of the District Court is correct and should be affirmed.

Respectfully submitted,

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[27] CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on counsel for the appellant and the appellees, by mailing four copies thereof on this *20th* day of April, 1987, in an envelope, with postage prepaid, properly addressed to them as follows:

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April 20, 1987

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Chief Judge

Hon. Thomas J. Meskill
Circuit Judge

Hon. Frank X. Altimari
Circuit Judge

United States Court of Appeals
for the Second Circuit
Foley Square
New York, New York 10007

Mary Rose v. *The Long Island Railroad Pension Plan, et al.*
(2d Cir. No. 86-7942)

Dear Chief Judge Feinberg and Judges Meskill and Altimari:

We understand that in the course of oral argument on March 30, 1987 the Court expressed an interest regarding the current position of those government bodies that previously filed

amicus briefs and affidavits in the above-referenced action, which presents the issue whether The Long Island Rail Road Pension Plan (the "LIRR Plan") is a "governmental plan" within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"). The State submitted an affidavit and amicus brief when this case was previously before the Court (Appendix at 121, 127). More recently, in March 1986, the State of New York submitted an affidavit in support of the LIRR's motion for summary judgment before Judge Bramwell (Appendix at 374).

This letter is submitted on behalf of the State of New York. It is the position of the State of New York that the LIRR Plan is a "governmental plan" under ERISA and thus not subject to most requirements of ERISA, including the funding requirements.

The State of New York hereby restates and reaffirms the position set forth in (i) the affidavit of Judith Gordon, sworn to March 17, 1986 (Appendix at 354), (ii) the affidavit of Amy Juviler, sworn to October 26, 1982 (Appendix at 121), and (iii) the brief submitted by the State of New York to this Court dated November 9, 1982 (Appendix at 127).

The LIRR is owned and operated for the benefit of the People of the State of New York and is governed by a Board appointed by the Governor of the State of New York with the advice and consent of the New York State Senate. Since its acquisition by the State through the Metropolitan Transportation Authority ("MTA") in 1966 the LIRR has had all the statutory privileges, immunities and exemptions of the MTA. N.Y. Pub. Auth. Law § 1266(5). The LIRR thus has possessed substantial governmental powers in its own right since it was acquired by the State in 1966 that it did not possess prior to the State's acquisition. (See Appellees' Br. at 14-18). For example, being wholly owned by the MTA, the LIRR has the power to make rules and regulations governing the conduct and safety of the public, violations of which are punishable by fine and up to 30 days imprisonment. N.Y. Pub. Auth. Law § 1266(4) and (5). Where such rules and regulations conflict with any local law, ordinance, rule or regulation, the LIRR's rule or

regulation prevails. *Id.* The LIRR also has its own police officers, who have powers equal to those of all other state, county and municipal police officers, on or off LIRR property (N.Y. Crim. Proc. Law § 1.20(34)(1); the LIRR is exempt from the jurisdiction of the Public Service Commission (now the New York State Department of Transportation) (N.Y. Pub. Auth. Law § 1266(8)); the LIRR is exempt from all state, county and municipal taxes (N.Y. Pub. Auth. Law § 1275); and the LIRR may conduct investigations and hearings and may apply for process of subpoena in aid thereof (*Id.* § 1265(12)). The LIRR also has a host of other governmental powers—including the power of eminent domain—which are set forth more fully in Appellee's Brief at 14-28.

The State of New York has a special and important interest in the outcome of this action because of its historic relationship to the MTA and the LIRR. Specifically, because of this historic relationship, the State of New York has since its acquisition of the LIRR substantially supported the LIRR through the legislative powers, including the provision of annual operating assistance appropriations during the entire period ERISA has been effective (see Appendix at 279-87). The fact of the substantial and continuing State financial support of the LIRR shows that the concerns that led Congress to exempt "governmental plans" (i.e., that the taxpayers not be unduly burdened) are directly applicable with respect to the LIRR Plan (see Appellees' Br. at 46-50). If the Court were to rule that the LIRR Plan is not a "governmental plan", we understand that the retroactive application of the decision to 1976 and the consequent recalculation and resultant higher benefits for Plan participants could result in an even greater burden on the taxpayers of the State (see Appendix at 427-32).

The LIRR has been a governmental body since its acquisition by the State in 1966, not just since 1980 when it formally became a public benefit corporation. In no way was the LIRR less a governmental body before February 1980 when it formally was converted by charter amendment to public benefit corporation status (see Appendix at 680-700; Appellees' Br. at 14-18).

The statutory bases of the historic relationship between and among the LIRR, MTA and the State of New York are set forth more fully in defendants-appellees' Rule 3(g) statement submitted below (see Appendix at 673). The extent of the State's direct and statutorily mandated operating assistance provided to the LIRR through the MTA is set forth more fully in the affidavits of Kenneth Bauer, Comptroller of the MTA, and James D. Sullivan, Executive Vice President of the LIRR (See Appendix at 276 and 361, respectively; see also Appendix at 123-24).

On behalf of the State of New York, we respectfully request and urge that the Court affirm the District Court's Order granting the LIRR's motion for summary judgment dismissing the complaint on the grounds that the LIRR Plan is a "governmental plan" under ERISA.

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York

By:

/s/ JUDITH A. GORDON
Judith A. Gordon
Assistant Attorney General

cc: Clerk of the Court
Eugene P. Souther, Esq.
Edgar Pauk, Esq.
David Preminger, Esq.

APPENDIX C

INTERNAL REVENUE SERVICE

National Office Technical Advice Memorandum

District Director
Brooklyn District Office

Taxpayer's Name: The Long Island Rail Road
Taxpayer's Address: Jamaica Station
Jamaica, New York 11435
Taxpayer's Identification No.: 11-6002502

ISSUE:

Whether the Long Island Rail Road Company (Railroad) is an agency or instrumentality of the Metropolitan Transportation Authority (Authority) within the meaning of section 414(d) of the Internal Revenue Code of 1954 as added by the Employee Retirement Income Security Act of 1974 (ERISA).

STATEMENT OF FACTS:

The Long Island Rail Road Company (Railroad) was chartered by the State legislature in 1834 for a 50-year period, which was extended in 1883 for an additional 250 years with the consent of its stockholders. In 1965, pursuant to the Metropolitan Commuter Transportation Act (Act) (Chapter 324 of the Laws of New York for 1965, as amended) the State of New York created the Metropolitan Commuter Transportation Authority, which is now the Metropolitan Transportation Authority (Authority). It was organized as a public benefit organization and given the power to purchase the Railroad. Accordingly, on December 22, 1965, the Authority purchased from the Pennsylvania Railroad Company (Pennsylvania) all of the issued and outstanding stock of the Railroad and at the same time acquired from Pennsylvania all debt securities (with minor exceptions) previously issued by the Railroad.

The Authority has a Board of Directors consisting of a chairman and ten other members who are appointed by the Governor with the consent of the Senate. This same Board of Directors also acts as the Board for the Railroad. Furthermore, the Chairman of the Board is the chief executive officer of the Railroad. In addition, the Railroad must obtain approval from the Board prior to (1) making capital expenditures, (2) engaging in a lease arrangement, (3) selling property, or (4) changing the train schedule and fares.

Since 1966, the stock of the Railroad has been wholly owned by the Authority, and only the Authority has access to the Railroad's earnings and profits. Also, if the Railroad should go into bankruptcy, any assets remaining after liquidation revert to the Authority, which is the sole shareholder of the Railroad stock. Upon termination of the Authority, all rights and properties of the Authority, including corporate stock owned by it, become vested in the State.

In a ruling issued on July 27, 1967 by the then Corporation Tax Branch, it was held that the Metropolitan Commuter Transportation Authority (Predecessor Authority) is a political subdivision of the State within the meaning of section 115(a)(1) of the Code but that, since the Railroad is a legal entity separate and distinct from the Authority, its income does not accrue to the Authority within the meaning of section 115(a) of the Code and thus it is not a political subdivision of the State and its income is not exempt from Federal income taxation.

However, the taxpayer contends that section 414(d) of the Code as added by ERISA is broader than section 115(a) of the Code, because the former section includes within its scope an agency or instrumentality of a political subdivision, whereas the latter includes only political subdivisions. The taxpayer goes on to say that the Railroad is a creature and instrumentality of the Authority, which, in turn, is a political subdivision of the State of New York.

APPLICABLE LAW:

Section 414(d) of the Code as added by ERISA provides that for purposes of this part, the term "governmental plan" means a plan established and maintained for its employees by the Government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

CONCLUSION:

We conclude, based on the facts in this case that the Railroad is an agency or instrumentality of the Authority within the meaning of section 414(d) of the Code.

—END—

APPENDIX D

* * *

[19] State of New York and that includes the amount of money to fund the Long Island Railroad Pension Plan? Was that your testimony?

A I said the basis for the State Controller's recommendation is that it was his feeling that all money comes from the State of New York and that, therefore, he made a recommendation of a Pay As You Go basis.

Q Is the feeling of the State Controller consistent with your knowledge of the source of funding for the Long Island Railroad Pension Plan?

MR. SOUTHER: You mean back in 1971?

MR. PAUK: At any time since 1971.

A It's—I'm thinking.

MR. SOUTHER: Do you understand the question?

THE WITNESS: Yes. I'm trying to think how to put my answer.

A The MTA gets its money primarily from three sources: The Federal Government since 1974; from Local Government, approximately 1974; and from the State since the MTA's inception, but the State is the only one of the three sources through which the amount can vary or increase in amount substantially.

The MTA has very little say-so in going to Congress or the Federal Government for funds. Local [20] Governments, there are twelve counties that it receives funds from. The sources there are rather limited.

But the State is really the only source of money outside of the Long Island Railroad's only resource which is the fare box.

So for all practical purposes, the State is the only source of funds to fund the Pension Plan for the Long Island Railroad.

Q To your knowledge, are the fare box receipts of the Long Island Railroad earmarked for non-pension fund expenses?

A Say that again.

Q To your knowledge, are the fare box receipts of the Long Island Railroad earmarked for purposes other than funding the Pension Plan?

A They fund salaries, wages, all operating expenses to the extent that they provide those services.

Q Including funding the Pension Plan?

A Yes.

Q How was the MTA set up? Do you know?

MR. SOUTHER: I object to the form of the question.

Q To your knowledge, who created the MTA?

A The State Legislature.

STATUTORY APPENDIX

New York Criminal Procedure Law

§ 1.20. Definitions of terms of general use in this chapter.

Except where different meanings are expressly specified in subsequent provisions of this chapter, the term definitions contained in Section 10.00 of the penal law are applicable to this chapter, and, in addition, the following terms have the following meanings:

* * *

34. "Police officer." The following persons are police officers:

* * *

(1) Long Island railroad police.

1965 N.Y. Laws ch. 324

An Act to amend the public authorities law and the state finance law, in relation to the creation of the metropolitan commuter transportation authority and making an appropriation therefor.

Approved and effective June 1, 1965.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative findings and declaration of purpose. It is hereby found and declared that:

1. Efficient and adequate transportation of commuters within the New York metropolitan area is of vital importance to the commerce, defense and general welfare of the people of the New York metropolitan area, the state, and the nation.

2. The continued deterioration of the financial situation and physical condition of the Long Island Rail Road, the New York, New Haven and Hartford Railroad and other companies providing rail commuter transportation services constitutes a serious threat to the economic well-being of the state.

3. This deterioration of rail commuter service has continued despite action by this state to provide modern commuter car equipment, substantial real property tax relief and station maintenance programs for eligible rail commuter transportation systems and despite intensive regional planning and programs conducted in concert with neighboring states and the pursuit of federal aid.

4. The federal government, the state and local governments have spent billions of dollars in recent years to provide limited access highways in the New York metropolitan area. The diminution or discontinuance of rail commuter transportation services would necessitate even greater expenditures for highways at great expense to the taxpayers and great inconvenience to the commuters and the people working or residing in the area.

5. In order to help insure a healthy economy for the state and the New York metropolitan area, the provision of adequate commuter facilities for the transportation of persons must be assured.

6. The urgent and immediate need for the stabilization, strengthening and improvement of commuter services for the transportation of persons in the metropolitan area can be met by the creation of a public authority to serve as the state's instrument for the carrying out of programs designed to continue and improve commuter services.

7. Through such public authority the state could deal flexibly and efficiently with the differing financial, managerial and operational problems involved in insuring the continuation of such essential commuter services as those presently being provided by the Long Island Rail Road and the New York, New Haven and Hartford Railroad.

8. It is declared to be the policy of the state that the preservation, strengthening and improvement of commuter services is an essential public purpose, and that it is in the public interest for the state and its political subdivisions, in

cooperation with other levels of government, to take appropriate measures and assume responsibilities for the preservation of such essential services.

* * *

New York Public Authorities Law

§ 1260. Short Title

This title may be cited as the "Metropolitan Transportation Authority Act."

§ 1261. Definitions

As used or referred to in this title, unless a different meaning clearly appears from the context:

* * *

13. "State agency" shall mean any officer, department, board, commissioner, bureau, division, public benefit corporation, agency or instrumentality of the state.

§ 1262. Metropolitan commuter transportation district

There is hereby created and established a commuter transportation district to be known as the metropolitan commuter transportation district which shall embrace the city of New York and the counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester, provided, however, that the district shall not include a county that has withdrawn from the district pursuant to section twelve hundred seventy-nine-b of this article.

§ 1263. Metropolitan transportation authority

1. (a) There is hereby created the "metropolitan transportation authority." The authority shall be a body corporate and politic constituting a public benefit corporation. The authority shall consist of a chairman and sixteen other members appointed by the governor by and with the advice and consent of

the senate. Four of the sixteen members other than the chairman shall be appointed on the written recommendation of the mayor of the city of New York; and each of seven other members other than the chairman shall be appointed after selection from a written list of three recommendations from the chief executive officer of the county in which the particular member is required to reside pursuant to the provisions of this subdivision.

* * *

(b) Vacancies occurring otherwise than by expiration of term shall be filed in the same manner as original appointments for the balance of the unexpired term.

* * *

5. The authority shall be a "state agency" for the purposes of sections seventy-three and seventy-four of the public officers law.

§ 1264. Purposes of the authority

1. The purposes of the authority shall be the continuance, further development and improvement of commuter transportation and other services related thereto within the metropolitan commuter transportation district, including but not limited to such transportation by railroad, omnibus, marine and air, in accordance with the provisions of this title. It shall be the further purpose of the authority, consistent with its status as the ex officio board of both the New York city transit authority and the triborough bridge and tunnel authority, to develop and implement a unified mass transportation policy for such district.

2. It is hereby found and declared that such purposes are in all respects for the benefit of the people of the state of New York and the authority shall be regarded as performing an essential governmental function in carrying out its purposes and in exercising the powers granted by this title.

§ 1265. General powers of the authority

Except as otherwise limited by this title, the authority shall have power:

* * *

9. (b) The authority and any of its public benefit subsidiary corporations may be a "participating employer" in the New York state employees' retirement system with respect to one or more classes of officers and employees of such authority or any such public benefit subsidiary corporation, as may be provided by resolution of such authority or any such public benefit subsidiary corporation, as the case may be, or any subsequent amendment thereof, filed with the comptroller and accepted by him pursuant to section thirty-one of the retirement and social security law. In taking any action pursuant to this paragraph (b), the authority and any of its public benefit subsidiary corporations shall consider the coverages and benefits continued or provided pursuant to paragraph (a) of this subdivision;

* * *

12. The authority may conduct investigations and hearings in the furtherance of its general purposes, and in aid thereof have access to any books, records or papers relevant thereto; and if any person whose testimony shall be required for the proper performance of the duties of the authority shall fail or refuse to aid or assist the authority in the conduct of any investigation or hearing, or to provide any relevant books, records or other papers, the authority is authorized to apply for process of subpoena, to issue out of any court of general original jurisdiction whose process can reach such person, upon due cause shown;

* * *

14. To do all things necessary, convenient or desirable to carry out its purposes and for the exercise of the powers granted in this title.

§ 1266. Special powers of the authority

In order to effectuate the purposes of this title:

1. The authority may acquire, by purchase, gift, grant, transfer, contract or lease, any transportation facility, wholly or partially within the metropolitan commuter transportation district, or any part thereof, or the use thereof, and may enter into any joint service arrangements as hereinafter provided. Any such acquisition of joint service arrangement shall be authorized only by resolution of the authority approved by not less than a majority vote of the whole number of members of the authority then in office, except that in the event of a tie vote the chairman shall cast one additional vote.

2. The authority may on such terms and conditions as the authority may determine necessary, convenient or desirable itself establish, construct, effectuate, operate, maintain, renovate, improve, extend or repair any such transportation facility, or may provide for such establishment, construction, effectuation, operation, maintenance, renovation, improvement, extension or repair by contract, lease or other arrangement on such terms as the authority may deem necessary, convenient or desirable with any person, including but not limited to any common carrier or freight forwarder, the state, any state agency, the federal government, any other state or agency or instrumentality thereof, any public authority of this or any other state, the port of New York authority or any political subdivision or municipality of the state. In connection with the operation of any such transportation facility, the authority may establish, construct, effectuate, operate, maintain, renovate, improve, extend or repair or may provide by contract, lease or other arrangement for the establishment, construction, effectuation, operation, maintenance, renovation, improvement, extension or repair of any related services and activities it deems necessary, convenient or desirable, including but not limited to the transportation and storage of freight and the United States mail, feeder and connecting transportation, parking areas, transportation centers, stations and related facilities.

3. The authority may establish, levy and collect or cause to be established, levied and collected and, in the case of a joint service arrangement, join with others in the establishment, levy and collection of such fares, tolls, rentals, rates, charges and other fees as it may deem necessary, convenient or desirable for the use and operation of any transportation facility and related services operated by the authority or by a subsidiary corporation of the authority or under contract, lease or other arrangement, including joint service arrangements, with the authority. Any such fares, tolls, rentals, rates, charges or other fees for the transportation of passengers shall be established and changed only if approved by resolution of the authority adopted by not less than a majority vote of the whole number of members of the authority then in office, with the chairman having one additional vote in the event of a tie vote, and only after a public hearing, provided however, that fares, tolls, rentals, rates, charges or other fees for the transportation of passengers on any transportation facility which are in effect at the time that the then owner of such transportation facility becomes a subsidiary corporation of the authority or at the time that operation of such transportation facility is commenced by the authority or is commenced under contract, lease or other arrangement, including joint service arrangements, with the authority may be continued in effect without such a hearing. Such fares, tolls, rentals, rates, charges and other fees shall be established as may in the judgment of the authority be necessary to maintain the combined operations of the authority and its subsidiary corporations on a self-sustaining basis. The said operations shall be deemed to be on a self-sustaining basis as required by this title, when the authority is able to pay or cause to be paid from revenue and any other funds or property actually available to the authority and its subsidiary corporations (a) as the same shall become due, the principal of and interest on the bonds and notes and other obligations of the authority and of such subsidiary corporations, together with the maintenance of proper reserves therefor, (b) the cost and expense of keeping the properties and assets of the authority and its subsidiary corporations in good condition and repair,

and (c) the capital and operating expenses of the authority and its subsidiary corporations. The authority may contract with the holders of bonds and notes with respect to the exercise of the powers authorized by this section. No acts or activities taken or proposed to be taken by the authority or any subsidiary of the authority pursuant to the provisions of this subdivision shall be deemed to be "actions" for the purposes or within the meaning of article eight of the environmental conservation law.

4. The authority may establish and, in the case of joint service arrangements, join with others in the establishment of such schedules and standards of operations and such other rules and regulations including but not limited to rules and regulations governing the conduct and safety of the public as it may deem necessary, convenient or desirable for the use and operation of any transportation facility and related services operated by the authority or under contract, lease or other arrangement, including joint service arrangements, with the authority. Such rules and regulations governing the conduct and safety of the public shall be filed with the department of state in the manner provided by section one hundred two of the executive law. In the case of any conflict between any such rule or regulation of the authority governing the conduct or safety of the public and any local law, ordinance, rule or regulation, such rule or regulation of the authority shall prevail. Violation of any such rule or regulation of the authority governing the conduct or the safety of the public in or upon any facility of the authority shall constitute an offense and shall be punishable by a fine not exceeding fifty dollars or imprisonment for not more than thirty days or both.

5. The authority may acquire, hold, own, lease, establish, construct, effectuate, operate, maintain, renovate, improve, extend or repair any of its facilities through, and cause any one or more of its powers, duties, functions or activities to be exercised or performed by, one or more wholly owned subsidiary corporations of the authority and may transfer to or from any such corporation any moneys, real property or other

property for any of the purposes of this title. The directors or members of each such subsidiary corporation shall be the same persons holding the offices of members of the authority. Each such subsidiary corporation and any of its property, functions and activities shall have all of the privileges, immunities, tax exemptions and other exemptions of the authority and of the authority's property, functions and activities. Each such subsidiary corporation shall be subject to the restrictions and limitations to which the authority may be subject. Each such subsidiary corporation shall be subject to suit in accordance with section twelve hundred seventy-six of this title. The employees of any such subsidiary corporation, except those who are also employees of the authority, shall not be deemed employees of the authority.

If the authority shall determine that one or more of its subsidiary corporations should be in the form of a public benefit corporation, it shall create each such public benefit corporation by executing and filing with the secretary of state a certificate of incorporation, which may be amended from time to time by filing, which shall set forth the name of such public benefit subsidiary corporation, its duration, the location of its principal office, and any or all of the purposes of acquiring, owning, leasing, establishing, constructing, effectuating, operating, maintaining, renovating, improving, extending or repairing one or more facilities of the authority. Each such public benefit subsidiary corporation shall be a body politic and corporate and shall have all those powers vested in the authority by the provisions of this title which the authority shall determine to include in its certificate of incorporation except the power to contract indebtedness.

Whenever any state, political subdivision, municipality, commission, agency, officer, department, board, division or person is authorized and empowered for any of the purposes of this title to co-operate and enter into agreements with the authority such state, political subdivision, municipality, commission, agency, officer, department, board, division or person shall have the same authorization and power for any of such

purposes to co-operate and enter into agreements with a subsidiary corporation of the authority.

6. The authority, in its own name or in the name of the state, may apply for and receive and accept grants of property, money and services and other assistance offered or made available to it by any person, government or agency whatever, which it may use to meet capital or operating expenses and for any other use within the scope of its powers, and to negotiate for the same upon such terms and conditions as the authority may determine to be necessary, convenient or desirable.

7. The authority may lease railroad cars for use in its passenger service pursuant to the provisions of chapter six hundred thirty-eight of the laws of nineteen hundred fifty-nine.

8. The authority may do all things it deems necessary, convenient or desirable to manage, control and direct the maintenance and operation of transportation facilities, equipment or real property operated by or under contract, lease or other arrangement with the authority. Except as hereinafter specially provided, no municipality or political subdivision, including but not limited to a county, city, village, town or school or other district shall have jurisdiction over any facilities of the authority or any of its activities or operations. The local laws, resolutions, ordinances, rules and regulations of a municipality or political subdivision, heretofore or hereafter adopted, conflicting with this title or any rule or regulation of the authority, shall not be applicable to the activities or operations of the authority, or the facilities of the authority, except such facilities that are devoted to purposes other than transportation purposes. Each municipality or political subdivision, including but not limited to a county, city, village, town or district in which any facilities of the authority are located shall provide for such facilities police, fire and health protection services of the same character and to the same extent as those provided for residents of such municipality or political subdivision.

The jurisdiction, supervision, powers and duties of the department of transportation of the state under the transportation law shall not extend to the authority in the exercise of any of its powers under the title. The authority may agree with such department for the execution by such department of any grade crossing elimination project or any grade crossing separation reconstruction project along any railroad facility operated by the authority or by one of its subsidiary corporations or under contract, lease or other arrangement with the authority. Any such project shall be executed as provided in article ten of the transportation law and the railroad law, respectively, and the costs of any such project shall be borne as provided in such laws, except that the authority's share of such costs shall be borne by the state.

9. Upon approval by the commissioner of transportation of the state of New York (or his successor) of detailed plans and specifications, which approval may be based upon considerations of relative need and the timing of construction, the authority is authorized to design, construct, maintain, operate, improve and reconstruct a highway bridge crossing Long Island sound, as follows:

* * *

10. Notwithstanding the provisions of any other law, general, special or local, or of any agreement entered into in pursuance thereof, relating to the repayment of any loan or advance made by the state to the authority or to the New York city transit authority, neither the authority nor the New York city transit authority shall be required to repay any such loan or advance heretofore made from or by reason of the issuance of bonds or notes of either of them or from the proceeds realized upon such issuance or from any other funds received by either of them from any source whatever in aid or assistance of the project or projects for the financing of which such bonds or notes are issued.

11. No project to be constructed upon real property theretofore used for a transportation purpose, or on an insubstantial addition to such property contiguous thereto, which will not change in a material respect the general character of such prior transportation use, nor any acts or activities in connection with such project, shall be subject to the provisions of article eight, nineteen, twenty-four or twenty-five of the environmental conservation law, or to any local law or ordinance adopted pursuant to any such article. Nor shall any acts or activities taken or proposed to be taken by the authority or by any other person or entity, public or private, in connection with the planning, design, acquisition, improvement, construction, reconstruction or rehabilitation of a transportation facility, other than a marine or aviation facility, be subject to the provisions of article eight of the environmental conservation law, or to any local law or ordinance adopted pursuant to any such article if such acts or activities require the preparation of a statement under or pursuant to any federal law or regulation as to the environmental impact thereof.

12. The authority may, upon suitable notice to and an offer to consult with an officer designated by the city of New York, occupy the streets of the city of New York for the purpose of doing any work over or under the same in connection with the improvement, construction, reconstruction or rehabilitation of a transportation facility without the consent of or payment to such city.

* * *

§ 1267. Acquisition and disposition of real property

1. In addition to the powers provided in section twelve hundred sixty-six of this title to acquire transportation facilities, equipment and real property, the authority may acquire, by condemnation pursuant to the condemnation law, any real property it may deem necessary, convenient or desirable to effectuate the purposes of this title, provided however, that any such condemnation proceedings shall be brought only in the supreme court and the compensation to be paid shall be

ascertained and determined by the court without a jury. Notwithstand[ing] the foregoing provisions of this subdivision one, no real property may be acquired by the authority by condemnation for purposes other than a transportation facility unless the governing body of the city, village or town in which such real property is located shall first consent to such condemnation.

2. Nothing herein contained shall be construed to prevent the authority from bringing any proceedings to remove a cloud on title or such other proceedings as it may, in its discretion, deem proper and necessary or from acquiring any such property by negotiation or purchase.

3. Where a person entitled to an award in the proceedings to condemn any real property for any of the purposes of this title remains in possession of such property after the time of the vesting of title in the condemnor, the reasonable value of his use and occupancy of such property subsequent to such time as fixed by agreement or by the court in such proceedings or by any court of competent jurisdiction shall be a lien against such award subject only to the liens of record at the time of vesting of title in the condemnor.

4. Title to all property acquired under this act shall vest in the authority.

5. The authority may, whenever it determines that it is in the interest of the authority, dispose of any real property or property other than real property, which it determines is not necessary, convenient or desirable for its purposes.

6. The authority may, whenever it shall determine that it is in the interest of the authority, rent, lease, or grant easements or other rights in, any land or property of the authority.

§ 1267-a. Acquisition and disposition of real property by department of transportation

If funds are made available by the authority for the payment of the cost and expense of the acquisition thereof, the commis-

sioner of transportation of the state of New York, when requested by the authority, may acquire such real property in the name of the state as may be determined from time to time by the authority as being necessary, convenient or desirable to effectuate the purposes of this title, may remove the owner or occupant thereof where necessary and obtain possession and, when requested by the authority, may dispose of any real property so acquired, all according to the procedure provided in section thirty of the highway law. The authority shall have the right to possess and use for its corporate purposes all such real property so acquired. Claims for the value of the property appropriated and for legal damages caused by any such appropriation shall be adjusted and determined by such commissioner with the approval of the authority or by the court of claims as provided in section thirty of the highway law. When a claim has been filed with the court of claims, the claimant shall cause a copy of such claim to be served upon the authority and the authority shall have the right to be represented and heard before such court. All awards and judgments arising from such claims shall be paid out of moneys of the authority. No real property may be acquired pursuant to the provisions of this section for purposes other than a transportation facility unless the governing board of the city, village or town in which such real property is located shall first consent to such acquisition. The provisions of this section shall not be applicable to the acquisition or disposition of real property required for the construction of the two highway bridges crossing Long Island sound referred to in section twelve hundred sixty-six of this chapter. The authority shall be empowered to lease for such other purposes as the authority may determine any part or parts of Republic airport not needed for transportation purposes.

§ 1275. Exemption from taxation

It is hereby found, determined and declared that the creation of the authority and the carrying out of its purposes is in all respects for the benefit of the people of the state of New York

and for the improvement of their health, welfare and prosperity and is a public purpose, and that the authority will be performing an essential governmental function in the exercise of the powers conferred upon it by this title. Without limiting the generality of the following provisions of this section, property owned by the authority, property leased by the authority and used for transportation purposes, and property used for transportation purposes by or for the benefit of the authority exclusively pursuant to the provisions of a joint service arrangement or of a joint facilities agreement or trackage rights agreement shall all be exempt from taxation and special ad valorem levies. The authority shall be required to pay no fees, taxes or assessments, whether state or local, including but not limited to fees, taxes or assessments on real estate, franchise taxes, sales taxes or other excise taxes, upon any of its property, or upon the use thereof, or upon its activities in the operation and maintenance of its facilities or on any fares, tolls, rentals, rates, charges or other fees, revenues or other income received by the authority and the bonds of the authority and the income therefrom shall at all times be exempt from taxation, except for gift and state taxes and taxes on transfers. This section shall constitute a covenant and agreement with the holders of all bonds issued by the authority. The terms "taxation" and "special ad valorem levy" shall have the same meanings as defined in section one hundred two of the real property tax law and the term "transportation purposes" shall have the same meaning as used in titles two-a and two-b of article four of such law.

§ 1276. Actions against the authority

1. As a condition to the consent of the state to such suits against the authority, in every action against the authority for damages, for injuries to real or personal property or for the destruction thereof, or for personal injuries or death, the eomplaint shall contain an allegation that at least thirty days have elapsed since the demand, claim or claims upon which such action is founded were presented to a member of the

authority or other officer designated for such purpose and that the authority has neglected or refused to make an adjustment or payment thereof.

2. An action against the authority founded on tort shall not be commenced more than one year after the cause of action therefor shall have accrued, nor unless a notice of claim shall have been served on the authority within the time limited by and in compliance with all the requirements of section fifty-e of the general municipal law.

3. The authority shall be liable, and shall assume the liability to the extent that it shall save harmless any duly appointed officer or employee of the authority, for the negligence of such officer or employee, in the operation of a vehicle or other facility of transportation owned or otherwise under the jurisdiction and control of the authority in the discharge of a duty imposed upon such officer or employee at the time of the accident, injury or damages complained of, while otherwise acting in the performance of his duties and within the scope of his employment.

4. The authority may require any person, presenting for settlement an account or claim for any cause whatever against the authority, to be sworn before a member, counsel or an attorney, officer or employee of the authority designated for such purpose, concerning such account or claim and when so sworn to answer orally as to any facts relative to such account or claim. The authority shall have power to settle or adjust all claims in favor of or against the authority.

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§ 1276-a. Annual audit of authority

The comptroller shall conduct an annual audit of the books and records of the authority and its subsidiary corporations. Such audit shall include a complete and thorough examination of such authority's receipts, disbursements, revenues and expenses during the prior fiscal year in accordance with the categories or classifications established by such authority for

its own operating and capital outlay purposes; assets and liabilities at the end of its last fiscal year including the status of reserve, depreciation, special or other funds and including the receipts and payments of these funds; schedule of bonds and notes outstanding at the end of its fiscal year and their redemption dates, together with a statement of the amounts redeemed and incurred during such fiscal year; operations, debt service and capital construction during the prior fiscal year.

The comptroller, upon completion of such audit, shall within sixty days thereafter, report to the governor and the legislature his findings, conclusions and recommendations thereof.

§ 1277. Station operation and maintenance

The operation, maintenance and use of passenger stations shall be public purposes of the city of New York and the counties within the district. The total cost to the authority and each of its subsidiary corporations of operation, maintenance and use of each passenger station within the district served by one or more railroad facilities of the authority or of such subsidiary corporation, including the buildings, appurtenances, platforms, lands and approaches incidental or adjacent thereto, shall be borne by the city of New York if such station is located in such city or, if not located in the such city, by such county within the district in which such station is located. On or before June first of each year, the authority shall determine and certify to the city of New York and to each such county the total cost to the authority and its subsidiary corporations, for the twelve-month period ending the preceding March thirty-first, of operation maintenance and use of each such passenger station within such city and each such county, respectively. On or before the following September first, of each year, such city and each such county shall pay to the authority such cost so certified to it on or before the preceding June first. If for such twelve-month period the authority determines that the total revenues of any railroad facility will be such as not to require payment for the full amount of the costs of operation, mainte-

nance and use of the passenger stations served by such facility, the authority in its discretion may reduce by a uniform percentage of established costs the amounts required of the city of New York, if such city is served by such facility, and each county so served, provided however, that the amount required of such city or any such county shall not be reduced for any such twelve-month period below the total cost to the authority and its subsidiary corporation so certified of maintenance and use of such passenger stations so served in such city or such county. Such city and each such county shall have power to finance such costs to it by the issuance of budget notes pursuant to section 29.00 of the local finance law.

In the event that a city or county shall fail to make payment to the authority for station maintenance as required pursuant to this section, or any part thereof, the chief executive officer of the authority or such other person as the chairman shall designate shall certify to the state comptroller the amount due and owing the authority at the end of the state fiscal year and the state comptroller shall withhold an equivalent amount from the next succeeding state aid allocated to such county or city from the motor fuel tax and the motor vehicle registration fee distributed pursuant to section one hundred twelve of the highway law, or amounts distributed pursuant to section ten-c of the highway law, or per capita local assistance pursuant to section fifty-four of the state finance law subject to the following limitations: prior to withholding amounts due the authority from such county or city, the comptroller shall pay in full any amount due the state of New York municipal bond bank agency, on account of any such county's or city's obligation to such agency; the city university construction fund pursuant to the provisions of the city university construction fund act; the New York city housing development corporation, pursuant to the provisions of the New York city housing development corporation act (article twelve of the private housing finance law); and the transit construction fund pursuant to the provisions of title nine-a of article five of the public authorities law. The comptroller shall give the director of the budget notification of any such payment. Such amount or

amounts so withheld by the comptroller shall be paid to the authority and the authority shall use such amount for the repayment of the state advances hereby authorized. When such amount or amounts are received by the authority, it shall credit such amounts against any amounts due and owing by the city or county on whose account such amount was withheld and paid.